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Third report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur*

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I. Introduction

1. During its sixty-sixth session (2014), the Commission decided to place the topic "*Jus cogens*" on its long-term programme of work.[1] The General Assembly, during its sixty-ninth session, took note of the inclusion of the topic on the Commission's long-term programme of work.[2] At its sixty-seventh session (2015), the Commission decided to place the topic on its current programme of work and to appoint a Special Rapporteur.[3] At its seventieth session, the General Assembly took note of the decision of the Commission to place the topic on its agenda.[4]

2. At its sixty-eighth session (2016), the Commission considered the first report of the Special Rapporteur[5] and decided to refer two draft conclusions to the Drafting Committee.[6] At its sixty-ninth session (2017), the Commission had before it the second report of the Special Rapporteur.[7] In his second report, the Special Rapporteur sought to identify the criteria for the identification of peremptory norms of general international law (*jus cogens*).

3. The present report considers the consequences and legal effects of *jus cogens* norms. Prior to doing so, the report will briefly set out the consideration of the topic at the sixty-eighth session of the Commission.

II. Previous consideration of the topic

A. Debate in the Commission

4. In the second report, the Special Rapporteur proposed six draft conclusions.[8] The draft conclusions on the identification of norms of *jus cogens* were based on article 53 of the Vienna Convention on the Law of Treaties (hereinafter, "1969 Vienna Convention"). On the basis of the debate in the sixty-eighth session of the Commission, the Special Rapporteur also proposed in that report that the name of the topic be changed from "*Jus cogens*" to "Peremptory norms of general international law (*jus cogens*)".[9] The proposed name change was generally welcomed by the members of the Commission.[10]

5. Draft conclusion 4 proposed by the Special Rapporteur put forward two requirements for the identification of a norm as a peremptory norm of general

[1] See Report of the Commission on the work of its sixty-sixth session, *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), para. 268 and annex.

[2] See General Assembly resolution 69/118 of 10 December 2014, para. 8.

[3] See Report of the Commission on the work of its sixty-seventh session, *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), para. 286.

[4] See General Assembly resolution 70/236 of 23 December 2015, para. 7.

[5] A/CN.4/693.

[6] See Report of the Commission on the work of it sixty-eighth session, *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), para. 100.

[7] A/CN.4/706.

[8] Ibid., para. 91.

[9] Ibid., para. 90.

[10] Report of the Commission on the work of its sixty-ninth session, *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), para. 146. Mr. Cissé, however, had suggested that the name of the topic be changed to "Identification of peremptory norms of international law" (A/CN.4/SR.3373). While Ms. Oral agreed with the name change, she stated that the phrase "general international law" should not be understood as excluding norms under specialized regimes (ibid.).

international law. First, it proposed that the norm must be "a norm of general international law" and, second, that "it must be accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted". Draft conclusion 5 proposed by the Special Rapporteur sought to provide details as to what is meant by "norms of general international law". It provided that customary international law "is the most common basis for the formation of *jus cogens* norms", general principles of law "can also serve as the basis of for *jus cogens* norms" and that a treaty rule "may reflect a norm of general international law capable of rising to the level of a *jus cogens* norm".

6. Draft conclusion 6 sought to emphasize that being a norm of general international law was not enough for the identification of *jus cogens* and that, in addition, there had to be acceptance and recognition. Draft conclusion 7 sought to describe the notion of the international community of States as a whole. It stated, *inter alia*, that it is the attitude of States that is relevant for the identification of *jus cogens* norms. It stated that, while the attitudes of actors other than States "cannot, in and of themselves, constitute acceptance and recognition", their attitudes may be relevant in providing "context and assessing the attitude of States". Finally, it emphasized that acceptance and recognition "by a large majority of States" was sufficient and that "[a]cceptance and recognition by all States is not required".

7. Draft conclusion 8 proposed by the Special Rapporteur concerned the meaning of the requirement of acceptance and recognition. It distinguished between acceptance and recognition for the purposes of the identification of *jus cogens*, on the one hand, and acceptance for the purposes of customary international law and recognition for the purposes of general principles of law, on the other. Finally, draft conclusion 9 described the evidence (and weight of the evidence) that may be used as evidence of acceptance and recognition of non-derogability, including treaties, resolutions, statements by States, and judgments of courts, as well as the work of the Commission.

8. The report and the proposed draft conclusions were generally well-received by the members of the Commission. The debate is described in the report of the Commission and need not be described fully here.[11] The main criticism levelled at the draft conclusions proposed in the second report of the Special Rapporteur was that the draft conclusions were repetitive. Most members thus stressed the need for streamlining the draft conclusions.[12] Much of that work was achieved in the Drafting Committee.

9. On substance, several members suggested that the second element of draft conclusion 4, acceptance and recognition, should include not only "non-derogation" but also the modification element as provided for in article 53 of the 1969 Vienna Convention.[13] With respect to draft conclusion 5, questions were raised about the

[11] Report of the Commission on the work of its sixty-ninth session, *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), paras. 162–210.

[12] See, for example, Mr. Jalloh (A/CN.4/SR.3372), Mr. Park (A/CN.4/SR.3369), Mr. Murphy (A/CN.4/SR.3370), Mr. Hmoud (ibid.), Mr. Hassouna (ibid.), Mr. Nolte (ibid.), Ms. Lehto (A/CN.4/SR.3372), Mr. Ruda Santolaria (ibid.), Mr. Reinisch (ibid.) and Ms. Escobar Hernandez (A/CN.4/SR.3373).

[13] See, e.g., Mr. Murphy (A/CN.4/SR.3369), Ms. Oral (A/CN.4/SR.3373) and Ms. Lehto (A/CN.4/SR.3372). Mr. Nguyen (A/CN.4/SR.3369), however, proposed a three-step approach to identification, to show that it is: (i) a norm of general international law; (ii) a norm from which no derogation is permitted; and (iii) a norm accepted and recognized by the international community of States as a whole.

definition of "general international law" and, in particular, whether a more concise definition of general international law was required.[14] Questions were also asked about the apparent hierarchy implied by the Special Rapporteur's proposal, which seemed to place customary international law above general principles of law and treaty law.[15] There were a large number of members who took the view that treaty law, in particular multilateral treaties, could not only reflect, but also generate peremptory norms of general international law.[16] Particular reference was made to norms in the Charter of the United Nations that had given rise to norms of *jus cogens*.[17] Other members questioned the place in the draft conclusions of general principles of law as a basis for peremptory norms of general international law.[18] On the whole, however, draft conclusion 5 proposed by the Special Rapporteur received support from the members of the Commission.

10. The main issue raised by members of the Commission with respect to draft conclusion 8 concerned the use of the phrase "large majority of States" to qualify the level of acceptance and recognition required for *jus cogens*. Many members expressed the view that the requirement should be larger and many proposed "a very large majority".[19] Other comments concerned the use of the word "attitudes" in connection with acceptance and recognition by States.[20] Many members made valuable comments concerning issues addressed in the first report, which were also addressed briefly in the second report. These included the questions of the desirability of an illustrative list[21] and the issue of the core characteristics of *jus cogens* norms.[22]

11. All the draft conclusions were referred to the Drafting Committee. On the basis of the helpful interventions by members of the Commission, the Drafting Committee was able to provisionally adopt draft conclusions 2 (general nature of peremptory norms of general international law (*jus cogens*)), 4 (criteria for identification of a peremptory norm of general international law (*jus cogens*)), 5 (bases for peremptory norms of general international law (*jus cogens*)), 6 (acceptance and recognition) and 7 (international community of States as a whole).[23] The Special Rapporteur has indicated his preference that the draft conclusions remain with the Drafting Committee and, for that reason, they have not been referred to the plenary.

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[14] See, e.g., Mr. Murase (A/CN.4/SR.3369) and Mr. Hmoud (A/CN.4/SR.3370).

[15] See, e.g., Ms. Oral (A/CN.4/SR.3373).

[16] See, e.g., Mr. Grossman Guiloff (A/CN.4/SR.3370) and Ms. Escobar Hernández (A/CN.4/SR.3373). See however, Mr. Hmoud (A/CN.4/SR.3370) and Sir Michael Wood (A/CN.4/SR.3372).

[17] See, e.g., Mr. Kolodkin (A/CN.4/SR.3372) and Ms. Galvão Teles (A/CN.4/SR.3373). See, for examples of a contrary view, Mr. Vásquez-Bermúdez (A/CN.4/SR.3372), Mr. Ruda Santolaria (ibid.) and Mr. Reinisch (ibid.).

[18] See, e.g., Mr. Murase (A/CN.4/SR.3369), Mr. Šturma (A/CN.4/SR.3370) and Mr. Murphy (A/CN.4/SR.3369). See, however, Mr. Hassouna (A/CN.4/SR.3370).

[19] See, e.g., Mr. Murase (A/CN.4/SR.3369), Mr. Rajput (A/CN.4/SR.3369) and Mr. Grossman Guiloff (A/CN.4/SR.3370).

[20] Mr. Hmoud (A/CN.4/SR.3370), Sir Michael Wood (summarized in A/CN.4/SR.3372), Mr. Grossman Guiloff (A/CN.4/SR.3370).

[21] See report of the Commission on the work of its sixty-sixth session (A/69/10), para. 180.

[22] Ibid., paras. 167–168 and 178.

[23] Statement of the Chairperson of the Drafting Committee on peremptory norms of general international law (*jus cogens*), 26 July 2017, annex.

B. Debate in the Sixth Committee of the General Assembly

12. Most States continued to express support for the Commission's consideration of the topic, while a few States continued to express concern.[24] A number of delegations expressed particular support for the approach adopted by the Special Rapporteur, the Commission and the Drafting Committee.[25] In the Sixth Committee, a number of States addressed particular draft conclusions provisionally adopted by the Drafting Committee. Some States expressed frustration that the draft conclusions adopted by the Drafting Committee were not reflected in the report, stating that this caused confusion.[26] This is a matter for the Commission to address in the context of the Working Group on working methods.

13. Some States expressed disagreement with draft conclusion 2 (characteristics) provisionally adopted by the Drafting Committee.[27] The United Kingdom of Great Britain and Northern Ireland, for example, while not necessarily disagreeing with the content, found the inclusion of characteristics unhelpful and noted that it could affect the criteria for the identification of *jus cogens* norms in article 53 of the 1969 Vienna Convention.[28] Other States, however, expressed appreciation and support for draft conclusion 2.[29] Singapore stated that the precise relationship between the characteristics and the criteria had to be clarified, perhaps in the commentary.[30] In addition to identifying the criteria, the Islamic Republic of Iran felt that it was important to also address the question of who can determine whether the criteria had been met.[31]

14. Most States expressed support for using article 53 of the 1969 Vienna Convention as the point for departure for the criteria for identifying peremptory norms.[32] The United Kingdom, however, went further, suggesting that not only should article 53 be the start point, it should also be the end point.[33] Thailand, for its part, recalled that the reliance on article 53 should also take into account the rules of interpretation in article 31 of the 1969 Vienna Convention.[34] With respect to the criteria, most States agreed with the two criteria identified by the Drafting Committee. The Russian Federation, however, suggested adding the additional element of "non-derogation" as a distinct element of the criteria for identification of norms of

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[24] States expressing support for the topic were Australia (A/C.6/72/SR.26), Belarus (ibid.), Croatia (A/C.6/72/SR.20), Czech Republic (A/C.6/72/SR.26), Denmark on behalf of Finland, Iceland and Sweden (A/C.6/72/SR.25), Greece (ibid.), Japan (A/C.6/72/SR.26), Portugal (A/C.6/72/SR.25), Romania (A/C.6/72/SR.26), Singapore (A/C.6/72/SR.25), Slovakia (A/C.6/72/SR.26), Slovenia (A/C.6/72/SR.25), South Africa (A/C.6/72/SR.24), Trinidad and Tobago on behalf of the Caribbean Community (CARICOM) (A/C.6/72/SR.25) and United Kingdom (A/C.6/72/SR.26). States expressing concern were France (A/C.6/72/SR.25), Turkey (A/C.6/72/SR.26) and the United States (ibid.).

[25] See, e.g., Argentina (A/C.6/72/SR.26), El Salvador (ibid.), Romania (ibid.) and Slovakia (ibid.).

[26] See, e.g., Austria (summarized in A/C.6/72/SR.25).

[27] See China (A/C.6/72/SR.23), France (A/C.6/72/SR.25), Israel (A/C.6/72/SR.26), Russian Federation (A/C.6/72/SR.19), United Kingdom (A/C.6/72/SR.26) and United States (ibid.).

[28] United Kingdom (A/C.6/72/SR.26). See also Netherlands (ibid.).

[29] See, e.g., Argentina (A/C.6/72/SR.26), Austria (A/C.6/72/SR.25), Belarus (A/C.6/72/SR.26), Peru (A/C.6/72/SR.25), Portugal (ibid.) and Slovenia (summarized in ibid.).

[30] Singapore (A/C.6/72/SR.25).

[31] Iran (Islamic Republic of) (A/C.6/72/SR.26).

[32] See, e.g., Russian Federation (summarized in A/C.6/72/SR.19), Thailand (A/C.6/72/SR.26) and Trinidad and Tobago on behalf of CARICOM (A/C.6/72/SR.25).

[33] United Kingdom (A/C.6/72/SR.26).

[34] Thailand (A/C.6/72/SR.26).

jus cogens.[35] In contrast, the Islamic Republic of Iran stated that non-derogability was a consequence and not a criterion.[36] Greece, for its part, suggested that consideration be given to including, as a third criterion, the element of reflecting the fundamental values of the international community.[37] The United Kingdom, for its part, suggested that the requirement for "acceptance and recognition" was not sufficient and that there should be a role for practice.[38] Also in connection with "acceptance and recognition", Slovakia suggested that more clarity was required,[39] while Slovenia suggested that consideration be given to acquiescence.[40] On this point, it might be worthwhile recalling the cautionary note of Croatia that the topic should take into account developments in the work of the Commission on the topics "Identification of customary international law" and, if it were to be added to the agenda, "General principles of law".[41]

15. A topic that attracted a significant amount of discussion concerned the sources of *jus cogens*. While the vast majority of States agreed that customary international law was the most obvious basis for peremptory norms, there were disagreements about the role of other sources. The Czech Republic and Germany, for example, expressed doubt about the possibility of the other sources forming the basis for peremptory norms.[42] On the other hand, the view was expressed that all three sources form the basis of peremptory norms. Other States expressed the view that, in addition to customary international law, general principles of law may also form the basis of peremptory norms.[43] The view that treaty rules may also form the basis of (in addition to just being reflective of) peremptory norms was also expressed.[44] Another view was that there was no support for the view that general principles could form the basis of peremptory norms.[45] Israel expressed agreement with the distinction between sources forming the basis of, and sources reflecting, peremptory norms.[46]

16. There was also general agreement among States that the standard of "large majority" in the draft conclusions proposed by the Special Rapporteur was insufficient. Many States therefore expressed support for the standard of a "very large majority" provisionally adopted by the Drafting Committee. China, however, commented that the standard "a very large majority" was as imprecise as "a large majority".[47] Other States, however, supported an even more stringent standard. Romania, in this connection, while supporting the standard of "very large majority", said that in practice this meant "quasi-unanimity".[48] Nevertheless, some States cautioned against language that might suggest that the consent of all States was

[35] Russian Federation (A/C.6/72/SR.19).
[36] Iran (Islamic Republic of) (A/C.6/72/SR.26).
[37] Greece (A/C.6/72/SR.25).
[38] United Kingdom (A/C.6/72/SR.26).
[39] Slovakia (A/C.6/72/SR.26).
[40] Slovenia (A/C.6/72/SR.25).
[41] Croatia (A/C.6/72/SR.20).
[42] Czech Republic (A/C.6/72/SR.26) and Germany (ibid.).
[43] Croatia (A/C.6/72/SR.24).
[44] Belarus (A/C.6/72/SR.26) and Russian Federation (A/C.6/72/SR.19). See, however, Spain (A/C.6/72/SR.25).
[45] China (A/C.6/72/SR.23), Spain (A/C.6/72/SR.25), stating that treaties could do no more than "reflect" norms of *jus cogens*, and United States (A/C.6/72/SR.26).
[46] Israel (A/C.6/72/SR.26).
[47] China (A/C.6/72/SR.23) and Germany (A/C.6/72/SR.26).
[48] Romania (A/C.6/72/SR.26). See also Russian Federation (A/C.6/72/SR.19) and United Kingdom (A/C.6/72/SR.26).

required.[49] At any rate, Poland correctly observed that the question of majority should be seen from the perspective of not only numbers, but also the representative character of those States.[50]

17. The question of regional *jus cogens* — a topic to be considered in the next report of the Special Rapporteur — was also raised. The view that regional *jus cogens* was not possible was expressed.[51] Germany, while agreeing that regional *jus cogens* was not possible under international law, preferred that the issue not be addressed at all.[52] Also concerning the scope of the topic, it was observed by some States that the Commission's consideration of the topic should be broader than just treaty law.[53]

18. The material in draft conclusion 9 proposed by the Special Rapporteur was also a topic of some discussion. Slovenia emphasized that the list was non-exhaustive.[54] The United States questioned the inclusion of judgments of international courts and tribunals as evidence of acceptance by States.[55] Many States continued to address the question of whether to include an illustrative list of norms. While some States supported an illustrative list, other States did not support it.[56] Other States were more nuanced in their concerns about the appropriateness of a list.[57]

19. The Special Rapporteur has taken note of most of those comments. Some of them could be addressed in the commentaries. Other comments might, on the basis of a future debate in the Commission or in the context of the finalization of the draft conclusions within the Drafting Committee, lead to the modification of draft conclusions provisionally adopted by the Draft Committee. It is worth emphasizing, however, that these comments will, at some stage, be taken into account prior to the adoption by the Commission of the draft conclusions on first reading.

III. Consequences of peremptory norms of general international law (*jus cogens*)

A. General

20. The syllabus on the basis of which the topic was included in the programme of work of the Commission stated that the "consideration of the effects and

[49] Slovenia (A/C.6/72/SR.25).

[50] Poland (A/C.6/72/SR.24).

[51] See, e.g., Poland (A/C.6/72/SR.24).

[52] Germany (A/C.6/72/SR.26). See also Japan (ibid.).

[53] Japan (A/C.6/72/SR.26) and the Netherlands (ibid.).

[54] Slovenia (A/C.6/72/SR.25). See also Chile (A/C.6/72/SR.23).

[55] United States (A/C.6/72/SR.26).

[56] States that did not support an illustrative list, were Australia (A/C.6/72/SR.26), Germany (ibid.), Netherlands (ibid.), Poland (A/C.6/72/SR.24), Russian Federation (A/C.6/72/SR.19), Spain (A/C.6/72/SR.25), Thailand (ibid.) and Turkey (A/C.6/72/SR.26). States that supported an illustrative list were Austria (A/C.6/72/SR.25), El Salvador (A/C.6/72/SR.26), Japan (ibid.), Mexico (A/C.6/72/SR.25), New Zealand (A/C.6/72/SR.24), Portugal (A/C.6/72/SR.25) and Slovenia (ibid.).

[57] E.g. Israel (A/C.6/72/SR.26) noted that drafting a list before the criteria and consequences were identified would be premature. Singapore took the view that whether it was a good idea would depend on the methodology (ibid.), while the Russian Federation (A/C.6/72/SR.19) stated that the question should be approached with caution.

consequences of *jus cogens* is likely to be the most challenging part of the study".[58] The effects and consequences of *jus cogens* have also been described, in addition to being the most challenging, as being the most important.[59] Costelloe has described the identification of the consequences of *jus cogens* as "the greater prize than identifying the norm itself".[60] Similarly, while noting that much of the literature on *jus cogens* is focused on its identification, Focarelli has stated that it "may prove pointless today to know that a norm is peremptory if there is no certainty about the specific legal effect that this characterisation involves".[61] To this end, Kolb has described the question of consequences and effects as "at once delicate, intricate and important".[62]

21. The importance and complexity of the issue of consequences become more pronounced when one considers the dearth in practice on the consequences of *jus cogens*.[63] It has often been observed that, while courts and tribunals have referred to *jus cogens*, even identifying norms that qualify as *jus cogens*, instances of identifying concrete legal consequences are few.[64] The Special Rapporteur is mindful thereof but takes the view that the Commission's approach in assessing the legal consequences of peremptory norms of international law should follow the same approach outlined in the first report of the Special Rapporteur:

> The Commission should proceed on the [basis of] established practice of considering a variety of materials and sources, in an integrated fashion. As is customary, the Commission approaches its topics by conducting a thorough

[58] Report of the Commission on the work of its sixty-sixth session (A/69/10), annex, para. 17. See also Ulf Linderfalk, "Understanding the *jus cogens* debate: the pervasive influence of legal positivism and legal idealism", *Netherlands Yearbook of International Law*, vol. 46 (2015), pp. 51–84, at p. 53.

[59] Netherlands (summarized in A/C.6/72/SR.26).

[60] Daniel Costelloe, *Legal Consequences of Peremptory Norms in International Law* (Cambridge, United Kingdom, Cambridge University Press, 2017), p. 15. See also Elizabeth Santalla Vargas, "In quest of the practical value of *jus cogens* norms", *Netherlands Yearbook of International Law*, vol. 46 (2015), pp. 211–239.

[61] Carlo Focarelli, "Promotional *jus cogens*: a critical appraisal of *jus cogens*' legal effects" (2008), *Nordic Journal of International Law*, vol. 77 (2008), pp. 429–459, at p. 440, adding that it "does not seem sufficient today to know that a norm is a peremptory; what is ultimately decisive is to what special effect it brings about".

[62] Robert Kolb, *Peremptory international law — jus cogens: a general inventory* (Oxford and Portland, Oregon, Hart Publishing, 2015), p. 104.

[63] See, e.g., Germany (A/C.6/72/SR.26), Netherlands (ibid.) and United States (ibid.).

[64] Dinah Shelton, "Sherlock Holmes and the mystery of *jus cogens*", *Netherlands Yearbook of International Law*, vol. 46 (2015), pp. 23–50, at p. 35 ("There is little state practice or jurisprudence in respect to either function; the actual function appears to be more akin to that of Sherlock Holmes, being an important, though symbolic expression or declaration of societal values"); Louis J. Kotzé, "Constitutional conversations in the Anthropocene: in search of environmental *jus cogens* norms", ibid., pp. 241–272, at p. 246; Stefan Kadelbach, "Genesis, function and identification of *jus cogens* norms", ibid., pp. 147–172, at p. 165 ("Whereas the expert drafters of the [1969 Vienna Convention] and the [articles on responsibility of States for internationally wrongful acts] had clear-cut consequences for practice in mind, courts subscribe to a rather abstract notion of peremptory norms without spelling out specific legal effects"); Thomas Kleinlein, "*Jus cogens* as the 'highest law'? Peremptory norms and legal hierarchies", ibid., pp. 173–210, at p. 175 ("Arguably, the disquieting uncertainties surrounding the hierarchical status of *jus cogens* are reflected in the fact that that it is actually very rare for *jus cogens* to have been successfully invoked in a court to resolve a norm conflict"). See, however, Sévrine Knuchel, "*Jus cogens*: identification and enforcement of peremptory norms" (Zurich, Schulthess, 2015), p. 3, listing a number of areas in which practice has recognized effects of *jus cogens*.

analysis of State practice in all its forms, judicial practice, literature and any other relevant material.[65]

22. A further methodological question pertaining to consequences involves the relationship between the criteria for *jus cogens*, on the one hand, and consequences, on the other. Some of those authors who maintain that the identification of the consequences is more important than the identification of a norm as one of *jus cogens* have argued that it is the consequences that give a norm its peremptoriness.[66] In other words, to determine whether a norm is one of *jus cogens*, it is not sufficient to apply some predetermined doctrinal criteria. Rather it is important to identify the consequences flowing from *that particular* norm and to determine whether those consequences involve "non-derogability", meaning then the norm is *jus cogens*.[67] Yet, as the second report of the Special Rapporteur illustrated, there are particular criteria that qualify a norm as a *jus cogens*.[68] This approach is consistent with both article 53 of the 1969 Vienna Convention and practice. Once a norm meets these criteria, certain consequences follow. It is the purpose of the present report to identify these consequences.

23. The Special Rapporteur pauses here to recall a sentiment expressed in both of the first two reports, namely that his approach is to avoid theoretical debates. Thus, much of the debate on the consequences of *jus cogens* seems to be focused on whether

[65] A/CN.4/693, para. 14.

[66] See, e.g., Stefan Kadelbach, "*Jus cogens*, obligations *erga omnes* and other rules — the identification of fundamental norms", in *The Fundamental Rules of the International Legal Order*, Christian Tomuschat and Jean-Marc Thouvenin, eds. (Leiden and Boston, Martin Nijhoff, 2006), p. 29. See also Kleinlein, "*Jus cogens* as the 'highest law'? Peremptory norms and legal hierarchies" (footnote 64 above), p. 176 ("the definition of peremptory norms in the second sentence of article 53 [of the 1969 Vienna Convention] refers to non-derogability as the decisive element of their special status").

[67] Kolb, *Peremptory international law — jus cogens* (see footnote 62 above), p. 2 ("*jus cogens* is defined by a particular quality of the norm at stake, that is, the legal fact that it does not allow derogation") and pp. 39–40, arguing that the correct approach is to "concentrate on the effect(s) of *jus cogens*" in defining it, rather than on "substantive content". Kolb claims that the Commission has adopted this approach by refraining from "indicating which norms are *jus cogens* or according to what substantive criteria such norms may be defined" (ibid., p. 39). See also Costelloe, *Legal Consequences of Peremptory Norms in International Law* (see footnote 60 above), p. 15 ("While the substance of certain primary norms in international law has certainly led to the development of the concept of peremptory norms, from a strictly legal point of view it is the norm's consequences through which it manifests itself in a way that is different in *kind* from other international legal norms. In practice, where it is not possible to point to particular effects that render a 'peremptory' norm different in kind from other international legal norms ... it is difficult to see which legal feature, if any, that term describes").

[68] See A/CN.4/706. See also statement of the Chairperson of the Drafting Committee on peremptory norms of general international law (*jus cogens*), 26 July 2017, annex.

a narrow or broad approach to the consequences of *jus cogens* ought to be adopted.[69] Very often, the choice as to whether to adopt a broad or narrow approach is motivated by policy considerations.[70] Knuchel captures the tendency of modern writers as follows:

> Scholarly contributions present a perplexing image of the effects of *jus cogens*: at the one end of the spectrum, *jus cogens* is denied any special legal effect, whereas at the other, it appears as a "do-it-all" kind of a norm.[71]

24. In the present report, the Special Rapporteur adopts neither a narrow nor broad approach, nor is there any attempt to mediate between the two approaches. Rather, consistent with the approach espoused in previous report, the Special Rapporteur attempts to identify the consequences of *jus cogens* using the traditional methods and materials of the Commission.

25. Structurally, there are many approaches that could be taken to assess the effects of *jus cogens* in international law. One could assess the effects of *jus cogens* through the lens of sources — treaty law, customary international law, general principles and unilateral acts. One might also assess the consequences of *jus cogens* on the basis of functions, e.g., functions of promotion accountability, functions of resolving conflict between rules of international law, invalidating functions or declaratory functions.[72] It might still be possible to assess the consequences of *jus cogens* through an analysis

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[69] See, for discussion, Maarten den Heijer and Harmen van der Wilt, "*Jus cogens* and the humanization and fragmentation of international law", *Netherlands Yearbook of International Law*, vol. 46 (2015), pp. 3–22, p. 4, noting that for some "*jus cogens* is nothing more than an apodictic incantation, pronounced by a magician waving his stick, to end all discussion". See especially Alexander Orakhelashvili, "Audience and authority — The merit of the doctrine of *jus cogens*", ibid., pp. 115–146, at p. 117 ("Depending on whichever audience one belongs to, one would be having a different view on *jus cogens*: either one that has broad transparent effects securing greater accountability, or a narrower version of it that eschews any significant judicial intrusion into matters that could be better sorted through high politics and diplomacy") and p. 118 ("Consequently, the proponents of the 'narrower' view of *jus cogens* currently occupy the same doctrinal niche as did the deniers of *jus cogens* decades ago"). See also Gennady Danilenko, *Law-making in the International Community* (Dordrecht, Boston and London, Martinus Nijhoff, 1993), p. 212 ("developments have indicated the desire of the international community to rely on *jus cogens* in a much broader context"); and Hugh Thirlway, *The Sources of International Law* (Oxford, Oxford University Press, 2014), p. 144.

[70] Thomas Giegerich, "Do damages claims arising from *jus cogens* violations override State immunity from the jurisdiction of foreign courts?", in *The Fundamental Rules of the International Legal Order*, Tomuschat and Thouvenin (see footnote 66 above), p. 205.

[71] Knuchel, "*Jus cogens*: identification and enforcement of peremptory norms" (see footnote 64 above), p. 4. See also Christian Tomuschat "Reconceptualizing the debate on *jus cogens* and obligations *erga omnes* — concluding observations", in *The Fundamental Rules of the International Legal Order*, Tomuschat and Thouvenin (see footnote 66 above), p. 426. See also Jean d'Aspremont, "*Jus cogens* as a social construct without pedigree" *Netherlands Yearbook of International Law*, vol. 46 (2015), pp. 85–114, p. 94 ("Indeed, thanks to *jus cogens*, international lawyers have felt that more could be expected from their systemic and morally cohesive legal order. This is how they come to find that the traditional legal effects associated with *jus cogens* were too modest and overly limited. By virtue of *jus cogens*, the allegedly systemic and morally cohesive international legal order remains an 'unfinished revolution', leaving international lawyers with an urge to make use of its irresistible power to finish the business."). See also Focarelli, "Promotional *jus cogens*" (footnote 61 above), p. 440 ("Courts and writers have progressively assumed that *jus cogens* must bring about a virtually unlimited number of 'overriding', if not 'constitutional', effects").

[72] Shelton, "Sherlock Holmes and the mystery of *jus cogens*" (see footnote 64 above), pp. 35 *et seq.* See also Kadelbach, "Genesis, function and identification of *jus cogens* norms" (footnote 64 above), pp. 161 *et seq.*

of the meaning of "derogability" as the principal consequences of *jus cogens*.[73] The consequences of *jus cogens* may also be studied from the perspective of different subject-matters of international law, e.g. human rights, the law of immunities, environmental law, peace and security etc.

26. These various systematic approaches — and there are certainly other possible approaches — each have their own attractions and drawbacks. The Special Rapporteur has, therefore, decided not to adopt any particular systematic approach but rather to focus on those potential consequences of *jus cogens* that have most often been identified. These can include consequences of *jus cogens* in relation to treaties and consequences of *jus cogens* in relation to State responsibility.

27. There are, however, other effects that have been identified and, as such, ought to be considered. The effects of *jus cogens* on individual criminal responsibility for breaches of international criminal law have also been raised often. In addition, the consequences of *jus cogens* for customary international law and for Security Council resolutions should also be considered.

28. Over the last two debates, both within the Commission and Sixth Committee, the Special Rapporteur's proposed core characteristics, which have since been incorporated into draft conclusion 2 provisionally adopted by the Drafting Committee, have been the subject of some discussion. One of the points that has been made by some members of the Commission and some States is that these characteristics are consequences and should accordingly be addressed in the context of consequences. The Special Rapporteur has consistently expressed the view that these characteristics themselves have consequences. For example, one of the consequences of hierarchical superiority is the invalidating effect of other norms of international law. This potential consequence can be assessed, for example, under the consequences of *jus cogens* in relation to treaties or customary international law. The report will, at appropriate places, in relation to specific consequences, refer to the characteristics.

29. The next section in the present chapter (section B) will address the consequences of *jus cogens* for treaties. Section C will address consequences of *jus cogens* for State responsibility, to be followed, in section D, by other consequences of *jus cogens*, including effects on individual criminal responsibility, consequences for other sources and consequences for international settlement of disputes.

B. Consequences of peremptory norms of general international law (*jus cogens*)

1. Invalidity of treaties on account of conflict with peremptory norms of general international law (*jus cogens*)

30. The legal consequence most synonymous with the *jus cogens* status of a norm is invalidity of treaties.[74] For some, this is the primary, or even sole, consequence of

[73] See, generally Kolb, *Peremptory international law — jus cogens* (footnote 62 above).

[74] Danilenko, *Law-making in the International Community* (see footnote 69 above), p. 212 ("As originally conceived within the codification process relating to the law of treaties, the concept of *jus cogens* applies only to treaty relationships. Its main function ... is to invalidate bilateral and multilateral agreements contrary to fundamental community rules recognized as 'higher' law"). See also Kleinlein, "*Jus cogens* as the 'highest law'? Peremptory norms and legal hierarchies" (footnote 66 above), p. 181.

the *jus cogens* status of a norm.[75] For others, because of the scant practice of invalidation of treaties on account of inconsistency with *jus cogens* norms, it is worth asking the question whether the consequence of invalidity of a treaty on account of *jus cogens* may have become dead letter law.[76] Of course, that might be overstating the case, because some writers have noted cases of invocations of invalidity of treaties on account of conflict with *jus cogens*.[77] It has even been suggested that the African Charter on Human and Peoples' Rights and the Arab Charter on Human Rights are invalid on account of being in conflict with the *jus cogens* norm of self-determination.[78]

31. Many States have, over the years, referred to treaties which, in their view, were invalid on account of inconsistency with *jus cogens* norms.[79] Whether those treaties were actually inconsistent with *jus cogens* norms is immaterial for present purposes.

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[75] See, generally, Kyoji Kawasaki, "A brief note on the legal effects of *jus cogens* in international law", *Hitotsubashi Journal of Law and Politics*, vol. 34 (2006), pp. 27–43, and Den Heijer and Van der Wilt, "*Jus cogens* and the humanization and fragmentation of international law" (footnote 69 above), p. 7. See also Thirlway, *The Sources of International Law* (footnote 69 above), p. 145 ("The significance of the quality of a norm as *jus cogens*, on the basis of Article 53 of the Vienna Convention, is simply to invalidate any agreement purporting to contradict or evade that norm. There has inevitably been a temptation for scholars to attach wider effects to the concept, since ... *jus cogens* ... [is to be given] the greatest possible scope"). *Cf.* Antonio Cassese, "For an enhanced role of *jus cogens*", in *Realizing Utopia. The Future of International Law*, Antonio Cassese, ed., (Oxford, Oxford University Press, 2012), p. 158 ("Furthermore, there has so far been no objection to the notion that *jus cogens* has or may have an impact on certain areas of international law other than treaty-making (such as recognition of states, reservations to treaties, immunity from jurisdiction, and so on)").

[76] Costelloe, *Legal Consequences of Peremptory Norms in International Law* (see footnote 60 above), p. 55 ("the relevant [1969 Vienna Convention] provisions are very narrow, and the question whether they still have much relevance or ... are now virtually a dead letter, is justified"); Hilary Charlesworth and Christine Chinkin, "The gender of *jus* cogens", *Human Rights Quarterly*, vol. 15 (1993), pp. 63–76, at pp. 65–66 ("Despite early fears that the inclusion of [article 53 of the 1969 Vienna Convention] would subvert the principle of *pacta sunt servanda* and act to destabilize the certainty provided by treaty commitments, *jus cogens* doctrine has been only rarely invoked in this context. It thus has had little practical impact upon the operation of treaties"); Kadelbach, "Genesis, function and identification of *jus cogens* norms" (see footnote 64 above), p. 161 ("direct conflict in the sense that a treaty has an illicit subject-matter is a theoretical case"). *Cf.* Cassese, "For an enhanced role of *jus cogens*" (see footnote 75 above), pp. 159–160 ("Should we conclude that consequently what is normally asserted to be a major advance accomplished by the 1969 Vienna Convention [...] has in fact proved over the years to be an outright flop?").

[77] See for examples, Shelton, "Sherlock Holmes and the mystery of *jus cogens*" (footnote 64 above), p. 36; and Kadelbach, "Genesis, function and identification of *jus cogens* norms" (footnote 64 above), p. 152. See for discussion Knuchel, "*Jus cogens*: identification and enforcement of peremptory norms" (footnote 64 above), p. 141.

[78] Robert P. Barnidge, "Anti-Zionism, *jus cogens*, and international law: the case of the Banjul Charter and the Arab Charter", *Journal of the Middle East and Africa* (forthcoming).

[79] Netherlands, (A/C.6/SR.781), para. 2 (On the question of *jus cogens* the "Agreement concerning the Sudeten German Territory, signed at Munich on 29 September 1938, was one of the few examples of treaties which had come to be regarded as contrary to international public order"). Cyprus, (A/C.6/SR.783), para. 18, listed a number of treaties as providing for nullity on account of conflict with peremptory norms, namely the prohibition on the use of force ("[t]he Covenant of the League of Nations, the General Treaty for the Renunciation of War as an Instrument of National Policy (known as the Briand Kellogg Pact), the Charter of the Nürnberg Tribunal, the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East and, most recently, Article 2, paragraph 4, of the Charter of the United Nations made it *lex lata* in modern international law that a treaty procured by the illegal threat or use of force was void *ab initio*). See also Israel (A/C.6/SR.784), para. 8.

What matters for the purpose of the current report is the belief that particular treaties are inconsistent with *jus cogens* and thus invalid. In the *East Timor* case, Australia, exploring the implications of the Portuguese argument, observes that if the Court were to accept the view of Portugal that the right to self-determination is a norm of *jus cogens* and then to find that the Timor Gap Treaty[80] was in conflict with the right to self-determination, "the treaty would then be void for that reason".[81] The United States has also expressed the view that the Treaty of Friendship between the Soviet Union and Afghanistan[82] might be invalid on account of conflict with *jus cogens* norms.[83] The General Assembly itself has determined that agreements that conflict with the principle of self-determination are invalid.[84] The General Assembly, for example, determined that the Camp David Accords[85] were invalid to the extent that they conflicted with the right of self-determination.[86] Although the General Assembly does not refer to *jus cogens*, the reason given for the invalidation is the right to self-determination, a norm of *jus cogens*.[87] There have also been court decisions that have considered the invalidity of treaties on account of inconsistency with *jus cogens* norms. In *Prosecutor v. Taylor*, the Special Court for Sierra Leone had to determine whether the provision in its own Statute removing immunities was invalid.[88] The Court held that since the provision was "not in conflict with any peremptory norm of general international law ... [it] must be given effect" by the Court.[89] Similarly, in the famous *Aloeboetoe v. Suriname* case, reliance had been placed on an agreement

[80] Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia.

[81] *East Timor (Portugal v. Australia)*, Counter-Memorial of Australia, 1 June 1992, para. 223.

[82] Treaty of Friendship, Good-Neighbourliness and Cooperation between Afghanistan and Union of Soviet Socialist Republics.

[83] See Memorandum of Legal Advisor of the United States State Department, Roberts B. Owen, to the Acting Secretary of State, Warren Christopher, dated 29 December 1979, in *Digest of United States Practice in International Law*, chap. 2, para. 4, reproduced in Marian L. Nash, "Contemporary practice of the United States relating to international law", *American Journal of International Law*, vol. 74 (1980), pp. 418–432, at p. 419 ("Nor is it clear that the treaty between the USSR and Afghanistan ... is valid. If it actually does lend itself to support of Soviet intervention of the type in question in Afghanistan, it would be void under contemporary principles of international law, since it would conflict with what the Vienna Convention describes as a 'peremptory norm of general international law' ... namely that contained in Article 2, paragraph 4 of the Charter.").

[84] See, e.g., General Assembly resolution 34/65 B of 29 November 1979, para. 2. See also General Assembly resolutions 36/51 of 24 November 1981 and 39/42 of 5 December 1984, both calling on States to terminate investments agreements concerning Namibia and declaring those agreements to be illegal.

[85] Framework for peace in the Middle East agreed at Camp David, signed at Washington, D.C., on 17 September 1978.

[86] General Assembly resolution 33/28 A, 7 December 1978. In paragraph 2, the resolution reaffirms that any solution to the Middle East conflict must be based on "the attainment of the inalienable rights of the Palestinian people, including ... the right to national independence and sovereignty in Palestine", while paragraph 4 declares that that "the validity of agreements purporting to solve the problem of Palestine" must be based on such rights.

[87] Giorgio Gaja, "*Jus cogens* beyond the Vienna Convention", *Collected Courses of The Hague Academy of International Law, 1981-III*, vol. 172, pp. 271–316, at p. 282 ("conflict with *jus cogens* being the most likely cause for the agreements to be declared void").

[88] *Prosecutor v. Charles Ghankay Taylor, Decision of the Special Court for Sierra Leone of 31 May 2004*, Case No. SCSL-2003-01-I, Appeals Chamber, Special Court for Sierra Leone, para. 53. See also *Prosecutor v. Morris Kallon and Brima Bazzy Kamara, Decision on challenge to jurisdiction: Lomé Accord Amnesty*, 13 March 2004, Case Nos. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Appeals Chamber, Special Court for Sierre Leone.

[89] *Prosecutor v. Taylor, Decision* (see previous footnote), para. 53.

concluded between the Netherlands and the Saramakas community.[90] The Court noted that, under the treaty, the Saramakas undertook to capture any escaped slaves and return them to slavery.[91] On that account, the Court held that the treaty would be "null and void because it contradicts the norms of *jus cogens superveniens*".[92]

32. At any rate, even without the practice, the nullity of treaties is the most obvious, and thus least contested, consequence of *jus cogens* status of a norm. It both follows from and is a reflection of the hierarchal superiority of *jus cogens* status of norms. At the same time, nullity is a far-reaching consequence because it strikes at the heart of a fundamental and foundational element of international law, namely *pacta sunt servanda*.[93] It significantly restricts the treaty-making, or even law-making, authority of States.[94] As illustrated in the Special Rapporteur's first report, while virtually all States supported the notion of *jus cogens* during the United Nations Conference on the Law of Treaties (hereinafter, "Vienna Conference"), some States were concerned about the threat it posed to the principle of *pacta sunt servanda* and the stability of treaty relations.[95]

33. The consequence of invalidity of treaties is spelt out in articles 53 and 64 of the 1969 Vienna Convention.[96] Article 53 provides as follows:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

34. The evolution of this article in the work of the Commission and the Vienna Conference is described in the first report of the Special Rapporteur and will not be repeated here, save where necessary to highlight a particular aspect of the consequence of invalidity.[97] As explained in the second report, the second sentence of

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[90] *Aloeboetoe and others* v. *Suriname (Reparation and Costs)*, Judgment, 10 September 1993, Inter-American Court of Human Rights, Series C, No. 15.

[91] Ibid., para. 57.

[92] Ibid.

[93] See, e.g., Christian Tomuschat, "The Security Council and *jus cogens*" in Enzo Cannizzaro (ed.), *The Present and Future of* Jus cogens (Rome, Sapienza, 2015), p. 17 ("Thus the 'sanctity' of treaties was put in jeopardy"). Christos L. Rozakis, "The conditions of validity of international agreements", *Revue Hellénique de Droit International*, vol. 26/27 (1973–1974), p. 226, at p. 248, has described invalidity on account of *jus cogens* under article 53 as "a revolutionary ground of invalidity". See also Georg Schwarzenberger, "International *jus cogens*?", *Texas Law Review*, vol. 43 (1964–1965), pp. 455–478, at pp. 459–460.

[94] Tomuschat, "The Security Council and *jus cogens*" (see previous footnote), p. 26 ("[I]t is precisely the object ... of *jus cogens* in the original sense to deny States ... the right to make use of [their] power on account of the vicious character of their mutual pledges. In terms of principle, this amounts to a decisive down-grading of national treaty-making power"). See Charlesworth and Chinkin "The gender of *jus cogens*" (footnote 76 above), pp. 65–66 ("The freedom of states to enter into treaties is thus limited by fundamental values of the international community. Despite fears that the inclusion of this provision would subvert the principle of *pacta sunt servanda* and act to destabilize the certainty provided by treaty commitments, *jus cogens* doctrine has been only rarely invoked").

[95] A/CN.4/693, para. 36.

[96] While reference will be made to the 1969 Vienna Convention, the same text is reproduced verbatim in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986).

[97] A/CN.4/693, paras. 28–37.

that provision provides a definition of *jus cogens*, from which the criteria for the identification of *jus cogens* norms were determined.[98] The first sentence of article 53 sets out the consequence of invalidity of treaties as a form of non-derogation. In other words, the primary consequence of *jus cogens* status is non-derogation, and invalidity is a manifestation of non-derogability. Article 53 provides for absolute invalidity of the treaty *ab initio* if the conclusion of the treaty occurs at the time of a conflicting peremptory norm.

35. Not much attention has been paid to the term "conflict" in the literature.[99] There is also little practice on the meaning of "conflict" within the meaning of article 53 of the 1969 Vienna Convention. The ordinary meaning of the term implies irreconcilable difference or mutually exclusive conflict.[100] Thus a treaty can be said to be in conflict with a norm of *jus cogens* if it purported to contract out of obligations imposed by *jus cogens* or where it purports to permit (or require) conduct contrary to a norm of *jus cogens*.[101] Seen in this light, "conflict" with a norm of *jus cogens* would amount to (an impermissible) derogation.

36. Article 64 of the 1969 Vienna Convention, which also provides for invalidity on account of peremptory norms, states that if "a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates". Article 64 provides for situations where the treaty was, at its conclusion, not in conflict with a peremptory norm, but a new peremptory norm emerges creating a subsequent conflict. The language of article 64 ("becomes void and terminates") makes clear that the treaty is not void *ab initio* but rather *becomes* invalid from time of the emergence of the peremptory norm.[102] The Commission, in its 1966 draft articles on the law of treaties, also made clear that draft article 61 (which became article 64 of the 1969 Vienna Convention), in contrast with draft article 50 (which became article 53 of the Convention) did not have the effect of making the treaty invalid from the time of its conclusion (retrospectively).[103]

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[98] See A/CN.4/706, paras. 36–37. See also, however, the works set out in footnotes 72 and 73 above, suggesting that the consequence (non-derogation) also constitutes the criteria.

[99] See, however, Costelloe, *Legal Consequences of Peremptory Norms in International Law* (see footnote 60 above), pp. 67 *et seq.*

[100] See third report on the law of treaties by Mr. Fitzmaurice, Special Rapporteur, *Yearbook ... 1958*, vol. II, document A/CN.4/115, p. 26 ("Hence it is only if the treaty involves a departure from or conflict with absolute and imperative rules or prohibitions of international law in the nature of *jus cogens* that a cause of invalidity can arise").

[101] Cannizzaro, "A higher law for treaties?" in *The Law of Treaties Beyond the Vienna Convention*, Cannizzaro, ed. (Oxford, Oxford University Press, 2011), p. 428.

[102] This can be compared with article 53 of the 1969 Vienna Convention, which states that the treaty *is* invalid.

[103] See paragraph (6) of the commentary to draft article 50 of the articles on the law of treaties, *Yearbook ... 1966*, vol. II, p. 177, at pp. 248–249 (draft article 50 "has to be read in conjunction with article 61 (Emergence of a new rule of *jus cogens*), and in the view of the Commission, there is no question of the present article having retroactive effects. It concerns cases where a treaty is void *at the time of its conclusion* by reason of the fact that its provisions are in conflict with an already existing rule of *jus cogens*. The treaty is wholly void because its actual conclusion conflicts with a peremptory norm of general international law. ... Article 61, on the other hand, concerns cases where a treaty, valid when concluded, becomes void and terminates by reason of the subsequent establishment of a new rule of *jus cogens* with which its provisions are in conflict. The words '*becomes* void and *terminates*' make it quite clear, the Commission considered, that the emergence of a new rule of *jus cogens* is not to have retroactive effects of the validity of a treaty. The invalidity is to attach only as from the time of the establishment of the new rule of *jus cogens*.").

37. The clear text of article 53 makes plain that a treaty which, at the time of its conclusion, is inconsistent with a norm of *jus cogens* is wholly invalid. Article 53 is not qualified: it does not provide, for example, that "provisions of a treaty" in conflict with *jus cogens* are invalid or a treaty is invalid "to the extent of its conflict with *jus cogens*". In other words, the provisions of a treaty invalid on account of inconsistency with *jus cogens* are not severable from the treaty. This plain meaning reading of article 53 is supported by other provisions of the 1969 Vienna Convention. The Convention provides, in general, for the possibility of severability of provisions of a treaty where grounds for invalidity, termination, withdrawal or suspension exist.[104] This general possibility of severability does not apply to article 53.[105] Although Shelton seems to suggests that severability is implicit in article 53, she offers very little justification.[106] She states that "it seems hardly reasonable that the entire [Charter of the United Nations], for example, would be declared void for an action of the [Security Council] that was held to violate *jus cogens*".[107] Yet this argument misses an important point. An action by the Security Council that is contrary to *jus cogens* does not impugn the Charter, but only the relevant Security Council resolution.

38. Moreover, some members of the Commission leading up to the adoption of the 1966 articles on the law of treaties were of the view that severability must be permitted even in cases of invalidity on account of inconsistency with *jus cogens*.[108] In the end, however, the Commission decided that *jus cogens* norms "are of so fundamental a character that, when parties conclude a treaty" in conflict with an already existing norm of *jus cogens*, "the treaty must be considered totally invalid".[109] The Commission took the view that it was always open to the parties "themselves to revise the treaty" and, in this way, achieve the result of severability.[110]

39. Like article 53, article 64 on the emergence of a new peremptory norm after the conclusion of a treaty does not provide that a "provision" of a treaty in conflict with a *jus cogens* norm becomes invalid or that a treaty is invalid to the extent of its invalidity. It provides that the treaty is invalid, which might be read to imply that, like article 53, the invalidity of a treaty following the emergence of a new norm of *jus cogens* applies to the treaty as a whole. Yet, paragraph 5 of article 44 does not include article 64 as one of those provisions where "no separation of the provisions of the treaty is permitted", suggesting that for article 64, severability is possible. This understanding is borne out by the commentary to article 61 of the Commission's draft articles on the law of treaties. While noting non-severability with regard to treaties that, at the time of conclusion were inconsistent with *jus cogens*, the Commission "felt that different considerations apply in the case of" a treaty conflicting with a new norm of *jus cogens*.[111] In these cases, in the view of the Commission, if "those

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[104] Art. 44 of the 1969 Vienna Convention.

[105] Art. 44, para. 5, of the 1969 Vienna Convention ("In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted").

[106] Shelton, "Sherlock Holmes and the mystery of *jus cogens*" (see footnote 64 above), pp. 36–37.

[107] Ibid., p. 36.

[108] See paragraph (8) of the commentary to draft article 41 of the articles on the law of treaties, *Yearbook ... 1966*, vol. II, p. 177, at p. 239 ("Some members were of the opinion that it was undesirable to prescribe that the whole treaty should brought to the ground in cases where only one part — and that a small part — of the treaty was in conflict with a rule of *jus cogens*").

[109] Ibid.

[110] Ibid. ("In such a case it was open to the parties themselves to revise the treaty so as to bring it into conformity with the law; and if they did not do so, the law must attach the sanction of nullity to the whole transaction").

[111] Para. (3) of article 61 of the draft articles on the law of treaties, *Yearbook ... 1966*, vol. II, p. 177, at p. 261.

provisions can properly be regarded as severable from the rest of the treaty, the Commission thought that the rest of the treaty ought to be regarded as still valid".[112] Whether a provision can be regarded as "properly" severable can be determined from the application of article 44 of the 1969 Vienna Convention. Under article 44, a provision is severable if:

(a) it is separable from the remainder of the treaty with regard to its application;

(b) acceptance of that provision was not an essential basis for the conclusion of the treaty;

(c) continued performance of the remainder of the treaty would not be unjust.

40. Invalidity of a treaty (or treaty provisions, in the case where severability is a possibility) is a consequence of inconsistency with *jus cogens* norms. Invalidity of a treaty (or treaty provisions), however, is also its own consequence. Article 69 of the 1969 Vienna Convention sets out the general consequences for invalidity of a treaty. There are, however, specific consequences outlined for invalidity on account of inconsistency with *jus cogens* norms.

41. For a treaty that is, at the time of its conclusion, inconsistent with *jus cogens*, and thus invalid *ab initio*, the consequences should be rather straightforward. Since no treaty comes into being — the essence of *ab initio* invalidity — no reliance can be placed on the provisions of the treaty. This notwithstanding, acts may have been performed in good faith reliance on the invalid treaty producing particular consequences. Article 71 of the 1969 Vienna Convention provides that, in the case of invalidity under article 53, "the consequences of any act performed in reliance on" a treaty provision conflicting with *jus cogens* should be eliminated.[113] First, it is worth pointing out that article 71, paragraph 1 (*a*), only requires the elimination of consequences of acts performed "in reliance on any provision which conflicts with the peremptory norm". In other words, there is no obligation to "eliminate" the consequences of acts performed in reliance on provisions not in conflict with *jus cogens*. Thus, even though the treaty as a whole may be invalid, *some* acts *performed* in reliance on provisions that themselves were not in conflict with *jus cogens* might be recognized. Second, the requirement is to "[e]liminate *as far as possible*"[114] the consequences of acts performed in reliance on the invalid treaty provisions. This suggests a recognition that there may well be some consequences of acts that may remain, i.e., it may not be possible to undo all the consequences.

42. The consequences of invalidity of a treaty or treaty provision(s) due to conflict with a subsequently emerging norm of *jus cogens* are a little more complicated. First, since the validity of the treaty between its conclusion and the emergence of the new peremptory norm remains unaffected, the acts performed in reliance on the invalid treaty or treaty provisions prior to the emergence of the *jus cogens* should remain valid. Presumably there cannot be a requirement for their elimination. Article 71, paragraph 2, of the 1969 Vienna Convention concerns the consequences of invalidity flowing from the emergence of a new norm of *jus cogens*. Article 71, paragraph 2 (*b*), provides that the termination of a treaty (or treaty provisions) under article 64 "[d]oes not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination". Thus, for the period between a treaty's

[112] Ibid.

[113] Art. 71, para. 1 (*a*), of the 1969 Vienna Convention.

[114] Emphasis added.

conclusion and the emergence of the *jus cogens* norm, the provision recognizes the validity of the treaty (or treaty provisions) and its consequences. However, subsequent to the emergence of the *jus cogens* norm, any right, obligation or situation may only be maintained if "their maintenance is not in itself in conflict with the new peremptory norm" of international law. This position is in sharp contrast with position of invalidity under article 53 (treaty in conflict with *jus cogens* at the time of conclusion). In the latter case, no rights, obligations and situations established through the execution of the treaty are recognized at all, regardless of whether such rights, obligations or legal situations are themselves inconsistent or not with *jus cogens*.

43. While rights, obligations or legal situations "created through execution" of a treaty that subsequently becomes invalid due to the emergence of a new peremptory norm continue to be recognized to the extent that they themselves are not inconsistent with *jus cogens*, the obligations under the treaty itself cease to be binding.[115] Needless to say, where the treaty provision is severable, obligations under the remaining provisions of the treaty will continue to apply.

44. Substantively, the consequences of *jus cogens* in relation to the invalidity of treaties may be summarized as follows:

(a) a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (*jus cogens*). Such a treaty does not create any rights or obligations;

(b) an existing treaty becomes void and terminates if it conflicts with a new peremptory norm of general international law (*jus cogens*) that emerges subsequent to the conclusion of the treaty. Parties to such a treaty are released from any further obligation to perform in terms of the treaty;

(c) a treaty that, at its conclusion, is in conflict with a peremptory norm of general international law (*jus cogens*) is invalid in whole, and no part of the treaty may be severed or separated;

(d) a treaty that becomes invalid due to the emergence of a new peremptory norm of general international law (*jus cogens*) terminates in whole, unless:

(i) the provisions that are in conflict with a peremptory norm of general international law (*jus cogens*) are separable from the remainder of the treaty with regards to their application;

(ii) the provisions that are in conflict with a peremptory norm of general international law (*jus cogens*) do not constitute an essential basis of the consent to the treaty; and

(iii) continued performance of the remainder of the treaty would not be unjust.

(e) parties to a treaty which is invalid as a result of being in conflict with a peremptory norm of general international law (*jus cogens*) at the time of the treaty's conclusion have a legal obligation to eliminate the consequences of any act performed in reliance on the treaty;

(f) the termination of a treaty on account of the emergence of a new peremptory norm of general international law (*jus cogens*) does not affect any right, obligation or legal situation created through the execution of the treaty prior to the

[115] Art. 71, para. 2 (*a*), of the 1969 Vienna Convention provides that the termination of a treaty under article 64 "[r]eleases the parties from any obligation further to perform the treaty".

termination of the treaty unless such a right, obligation or legal situation is itself in conflict with a peremptory norm of general international law (*jus cogens*).

2. Procedure for invalidating treaties on account of conflict with peremptory norms of general international law (*jus cogens*)

45. The first report recalled that, during the Vienna Conference, States generally supported *jus cogens* and that, to the extent that there were any concerns about articles 53 and 64, it arose from the fear that the power to invalidate treaties could be abused by States unilaterally invoking articles 53 and 64 and thus threatening the stability of treaty relations.[116] To address the concern, the 1969 Vienna Convention subjects any reliance on articles 53 and 63 to a process involving judicial dispute settlement procedures.[117] Whether the processes established by the Convention are customary international law is, at best, doubtful. Nonetheless, even if the provisions are not customary international law, given the sensitivity of invalidating treaty relations unilaterally, it is, in the view of the Special Rapporteur, appropriate to provide for a similar safeguard in the current draft conclusions.

46. Article 65 of the 1969 Vienna Convention provides a general procedure for invalidating, terminating, withdrawing from or suspending the operation of the treaty. In brief, article 65 provides for parties seeking to, *inter alia*, invalidate a treaty to notify other parties giving a specified notice period, which, if at the expiry of which there is no objection, the invalidation will take effect. If there is an objection, article 65 also provides for an amicable resolution of the dispute. Article 65, however, does not specify how, if such a resolution cannot be found between the objecting party and the notifying party, the matter is to be resolved.

47. In the event that there is no amicable solution under article 65, article 66 provides for two separate procedures. The first of these, applicable to cases not involving *jus cogens*, and the details of which are provided for in the annex to the Convention, involve a conciliation commission set up by the Secretary-General of the United Nations.[118] Ultimately, this procedure is also an amicable solution procedure.[119] In the case of invalidity based on article 53 or invalidity and termination based on article 64, the Convention provides for a more definitive dispute settlement procedure. Article 66 (*a*) thereof provides that, in the event the process in article 65 does not yield a solution, "[a]ny one of the parties to the dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice ... unless the parties agree submit the matter to arbitration".

48. As a preliminary point, it is important to point out that article 66 (*a*) does not establish the condition for invalidity.[120] Article 53 is clear and unambiguous that a treaty *is* void if it conflicts with a norm of *jus cogens*, while article 64 is equally clear

[116] A/CN.4/693, para. 36 ("Thus, while there was certainly a great deal of debate and some concern expressed [regarding] the *jus cogens* provision, this concerned more the detail and application of the rule embodied in [the] text rather than the rule itself").

[117] Ibid.

[118] See art. 66 (*b*) of the 1969 Vienna Convention, read with the annex thereto.

[119] See paras. 4–6 of the annex to the 1969 Vienna Convention.

[120] See, e.g., individual opinion by Judge Winiarski in *Effects of awards of compensation made by the U.N. Administrative Tribunal, Advisory Opinion of 13 July 1954: I.C.J. Reports 1954*, p. 47, at p. 65 ("The view that it is only possible for a party to rely on the rule relating to nullities where some procedure for this purpose is established, finds no support in international law ... the absence of an organized procedure does not do away with nullities, and there is no warrant for the idea that there can be no nullity if there is no appropriate court to take cognizance of it").

that a treaty becomes void and terminates if it conflicts with a new emerging norm of *jus cogens*. These provisions provide for absolute and automatic nullity of a treaty in conflict with *jus cogens*. There is nothing in article 66 that changes this position of absolute and automatic nullity.[121] The decision by the International Court of Justice or an arbitral tribunal under article 66 (*a*) does not create the nullity, it merely declares or confirms it.[122] While it is correct, as has been pointed out that "it would be difficult to claim authoritatively that a treaty is void" on the basis of "unilateral statements" under article 53, this is not as a result of a consequence flowing from *jus cogens*.[123] Rather, it is a general problem of international law that arises from auto-interpretation resulting from a decentralized legal system without a compulsory system of adjudication. The problem applies equally to invalidity on account of fraud or coercion.

49. As a second preliminary point, while the text of article 66 (*a*) refers to "a dispute concerning the application or the interpretation of article 53 or 64", it seems clear that the provision is limited to a particular aspect of *jus cogens*, namely invalidity of a treaty. In this respect, article 66 (*a*) should be seen in the context of section 4 of part V of the Convention, namely the procedure for invalidity. Thus article 66 (*a*) cannot be invoked for the purpose of determining whether a particular norm is a norm of *jus cogens* or for the purposes of identifying other consequences of *jus cogens*. This narrow reading of article is confirmed by the case concerning *Armed Activities on the Territory of the Congo*.[124] In its application, the Democratic Republic of the Congo contended that article 66 (*a*) of the 1969 Vienna Convention established "the jurisdiction of the Court to settle disputes *arising from the violation of peremptory norms*".[125] Yet the dispute did not concern the narrow question of the invalidity of a treaty, since the Democratic Republic of the Congo was not claiming that *a given treaty* was invalid on account of *jus cogens*. It is that narrow question (of invalidity) that is the subject of article 66.[126]

50. Article 66 (*a*) raises at least two issues. First, it is unclear who may approach the International Court of Justice in the event of dispute as to the validity of the treaty. Can a third State that is not a party to the treaty also approach a Court under article 66 (*a*)? Second, can the procedure under article 66 (*a*) be relied upon outside the 1969 Vienna Convention context, i.e., by or against a State not party thereto?

51. It is perhaps useful to begin with the question whether the article 66 (*a*) procedure can be relied upon outside the context of the Convention. International law on the question is quite clear. As a rule, treaties are only binding on, and provide benefits to (and impose burdens on), parties to the relevant treaties.[127] There are, of

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[121] See, however, Gaja, "*Jus cogens* beyond the Vienna Convention" (footnote 87 above), p. 283 ("conflict with a peremptory norm would not make a treaty void unless one of the parties took some action to this end").

[122] *Cf.* Merlin M. Magallona, "The concept of *jus cogens* in the Vienna Convention on the Law of Treaties", *Philippine Law Journal*, vol. 51 (1976), pp. 521–542, at pp. 529 and 533.

[123] Costelloe, *Legal Consequences of Peremptory Norms in International Law* (see footnote 60 above), p. 76.

[124] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6.

[125] Ibid., paras. 1 and 15 (emphasis added).

[126] See, in this regard, the response of Rwanda to the contention of the Democratic Republic of the Congo, ibid., para. 123. See for discussion Focarelli, "Promotional *jus cogens*" (footnote 61 above), pp. 431–433.

[127] See generally art. 34 of the 1969 Vienna Convention.

course, exceptions to this general rule under the Convention.[128] International law also recognizes that treaty rules, not binding on third States, can become binding on third States if they become customary international law through practice and *opinio juris*. There is, however, no evidence of practice or *opinio juris* to support the conclusion that the procedure in article 66 (*a*) is customary international law. However, without this process, there remains the remote,[129] yet far-reaching, possibility of unilateral claims of invalidity. After all, as proposed in the Special Rapporteur's first and second reports and unanimously accepted by members of the Commission, *jus cogens* is firmly part of general international law even beyond the law of treaties and the 1969 Vienna Convention.[130] Thus if, beyond the 1969 Vienna Convention, the article 66 process is not part of general international law, and articles 53 and 64 are, the door would be open for States to unilaterally declare a treaty invalid on account of conflict with *jus cogens*, if the safeguard in article 66 were not used.[131]

52. In the light of this, the Special Rapporteur proposes that the Commission recommends, as a practice, that, even in cases where the Vienna Convention does not apply because one or both of the States are not party to the Vienna Convention, the procedure in article 66 (*a*) should be applicable.[132] Any draft conclusion, if adopted, would need to be accompanied by commentary that spells out clearly that the provision is only recommended practice and does not reflect the state of international law. At any rate, this recommended practice would always be subject to the jurisdictional requirements of the International Court of Justice under Article 36 of its Statute, i.e. it could not be made law by operation of the draft conclusions. However, a State that withholds its consent for judicial settlement runs the risk of a State unilaterally declaring a treaty invalid on account of conflict with *jus cogens* or conversely, its declaration of invalidity of a treaty on account of conflict of *jus cogens* not being recognized. These practical considerations, coupled with a draft conclusion by the Commission, may encourage both the party seeking to invalidate a treaty, and the party seeking to maintain the treaty, to submit to international adjudication.

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[128] See art. 35 of the 1969 Vienna Convention, which provides that an "obligation arises for a third State from a provision of treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing". See also art. 36, which provides for the possibility of treaties providing rights for third States and the condition under which this right accrues.

[129] That the possibility is remote is evidenced by the limited number of claims seeking to invalidate a treaty on account of conflict with *jus cogens*.

[130] A/CN.4/693, paras. 46–49, and A/CN.4/706, para. 32. See for discussion Santalla Vargas, "In quest of the practical value of *jus cogens* norms" (footnote 60 above), pp. 213 *et seq.*

[131] See, however, Magallona, "The concept of *jus cogens* in the Vienna Convention on the Law of Treaties" (footnote 122 above). Although Magallona comes to the opposite conclusion, her conclusion seems to be based on the erroneous belief that a treaty in conflict with *jus cogens* becomes invalid when declared so under the article 66 procedure.

[132] The Commission has previously modelled article 9 of the articles on the effects of armed conflicts on treaties on article 66 of the 1969 Vienna Convention, *Yearbook ... 2011*, vol. II (Part Two), paras. 100–101.

53. It has been suggested that article 66 (*a*), on its terms, can only be invoked by parties to the treaty in question.[133] Yet it is not clear that, on its terms, article 66 (*a*) applies only to the parties to the treaty claimed to be invalid. It is true that article 66 (*a*) refers to the "the parties" and article 2 of the 1969 Vienna Convention defines "party" as a "State which has consented to be bound by the treaty and for which the treaty is in force".[134] Yet article 66 (*a*) does not just speak of "parties" but, rather, "[a]ny *one of* the parties to a dispute concerning the application or the interpretation of article 53 or 64" (emphasis added). The literal meaning of this phrase would seem to go beyond "party" as defined in article 2, paragraph 1 (*g*), and include any party to a dispute involving the interpretation of article 53 or 64.

54. Of course, it is unlikely for a State not party to a treaty to be involved in a dispute involving the interpretation or application of a treaty. From that perspective, an alternative interpretation of article 66 (*a*) would be to regard "part[y] to a dispute" as meaning "party to the treaty involved in a dispute as to its conflict with a norm of *jus cogens*". Yet, an interpretation of article 66 (*a*) that excludes other States from approaching the International Court of Justice for a determination of the validity of the treaty creates the potential for uncertainty. A State that is not a party to a treaty that, in its view, conflicts with *jus cogens* would be duty bound not to recognize such a treaty and consequences flowing therefrom.[135] After all, the nature of *jus cogens* requiring absolute invalidity and non-recognition should permit any State to invoke *jus cogens* to invalidate a treaty where such a treaty is in conflict with a norm of *jus cogens*.[136] It is thus in the interest of certainty to provide, in a draft conclusion, subject to the above qualifications, that: any dispute concerning whether a treaty conflicts with a peremptory norm of general international law (*jus cogens*) should be submitted to the International Court of Justice for a decision, unless the parties to the dispute agree to submit the dispute to arbitration.

3. The effects of peremptory norms of general international law (*jus cogens*) on treaty interpretation

55. One of the most fundamental rules of the international legal system is *pacta sunt servanda*. This principle of international law has been codified in article 26 of the 1969 Vienna Convention.[137] The application of the rules in article 53 and 64 of the

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[133] Knuchel, "*Jus cogens*: identification and enforcement of peremptory norms" (footnote 64 above), p. 152. See also Christian Tomuschat, "Obligations arising for States without or against their will", *Collected Courses of The Hague Academy of International Law, 1993*, vol. 195, pp. 241–374, at p. 363 ("The drafters of the Vienna Convention ... have even gone so far as to make conflict of a treaty with a norm of *jus cogens* a legal occurrence that, in a similar fashion, *should* be settled exclusively between the parties to the treaty, no third State being allowed to invoke nullity if none of the State parties has come up with this claim" (emphasis added)); Karl Zemanek, "The metamorphosis of *jus cogens*: from an institution of treaty law to the bedrock of the international legal order?" in *The Law of Treaties Beyond the Vienna Convention*, Cannizzaro (footnote 101 above), p. 392 ("only a contracting party can assert the nullity").

[134] Art. 2, para. 1 (*g*), of the 1969 Vienna Convention.

[135] See, for further discussion, paras. 95–101 below.

[136] Antonio Cassese, *International Law*, 2nd ed. (Oxford, Oxford University Press, 2005), p. 177 ("it would seem that the *customary* rules corresponding to the Vienna Convention's provisions on invalidity of treaties should be interpreted to the effect that *any State concerned*, whether or not party to the treaty, may invoke *jus cogens*"); Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford, Oxford University Press, 2006), p. 142 ("Another implication of objective invalidity under Article 53 ... is that standing to invoke invalidity is not limited to the parties to the treaty").

[137] Art. 26 of the 1969 Vienna Convention provides as follows: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

Convention have the potential to undermine this very important principle by providing for the invalidity of treaties freely entered into. While the Convention provides other grounds for invalidating treaties,[138] the *jus cogens* ground for invalidity (articles 53 and 64) is the only ground that goes against *pacta sunt servanda*. All the other grounds relate to cases where there is some "flaw" in the consensus underlying the agreement. The effects of *jus cogens* on the validity of treaty, thus, represents an astonishing limitation on the important principle of *pacta sunt servanda*. The far-reaching impact of *jus cogens* on treaty validity has led one commentator to describe it as "draconian".[139]

56. There is an obvious need to avoid the "draconian" impact of invalidating a treaty reflecting the true consensus of parties to that treaty. However, the implications of articles 53 and 64 are clear: a treaty in conflict with a norm of *jus cogens* is, or becomes, invalid. That said, whether or not a treaty conflicts with a norm of *jus cogens* can only be determined after the establishment of the meaning of the treaty, which can only be done through the application of the customary international law rules of interpretation found in articles 31 and 32 of the Convention.[140]

57. The basic rule of interpretation calls for treaties to be interpreted in good faith, with the words in the treaty given their ordinary meaning, in their context and in the light of the object and purpose of the treaty.[141] As part of this basic rule, the Vienna rules require that the interpreter take into account other elements, including subsequent agreements (art. 31, para. 3 (*a*)) and subsequent practice (art. 31, para. 3 (*b*)). Of particular importance is article 31, paragraph 3 (*c*), which provides that the interpreter "shall" take into account "[a]ny relevant rules of international law applicable in the relations between the parties". According to the Commission's Study Group on fragmentation, "reference to general rules of international law in the course of interpreting a treaty is an everyday, often unconscious ... process".[142] The importance of this rule is described by Study Group as being to "carry out the interpretation so as to see the rules in view of some comprehensible ... objective" and "to prioritize concerns that are more important"[143] — in a phrase, to promote hierarchy. These rules include norms of *jus cogens*.[144]

58. The exposition above reveals two legal facts. First, where it is possible, the invalidation of a treaty reflecting the consensus between the parties should be avoided

[138] Lack of authority (arts. 46 and 47), error (art. 48), fraud (art. 49), corruption of State authority (art. 51), coercion (art. 52).

[139] Costelloe, *Legal Consequences of Peremptory Norms in International Law* (see footnote 60 above), p. 69.

[140] Draft conclusion 2, para. 1, of the draft conclusions on subsequent agreements and subsequent practice in relation to treaty interpretation, adopted by the Commission on first reading. Report of the Commission on the work of its sixty-eighth session (A/71/10), para. 75 ("Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the rule on supplementary means of interpretation. These rules also apply as customary international law"). For authority for the proposition, see para. 4 of the commentary to draft conclusion 2, ibid., para. 76.

[141] Art. 31, para. 1, of the 1969 Vienna Convention.

[142] "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", report of the Study Group of the International Law Commission finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr.1 and Add.1) (available on the Commission's website, documents of the fifty-eighth session; the final text will be published as an addendum to *Yearbook ... 2006*, vol. II (Part One)), para. 414.

[143] Ibid., para. 419.

[144] Cezary Mik, "*Jus cogens* in contemporary international law", *Polish Yearbook of International Law*, vol. 33 (2013), pp. 27–93, p. 74.

in keeping with the *pacta sunt servanda* principle. In other words, it should not be too easily accepted that a treaty is invalid for being inconsistent with a norm of *jus cogens* and, as far as possible, validity of a treaty should be strived for. The second legal fact described above is that, in seeking the meaning of a treaty, the norms of *jus cogens* should be taken into account. Taken together, these two legal elements would require that the application of the rules of interpretation in articles 31 and 32 should, as far as possible, seek to achieve a meaning that is consistent with *jus cogens* and thus avoid the "draconian" effect of invalidity. Needless to say, this does not mean that the other elements of interpretation in the 1969 Vienna Convention can be ignored in order to achieve a meaning consistent with *jus cogens*. The latter would not be "interpretation" but rather modification, an exercise that should be left to the parties.

59. Although not expressly invoking article 31, paragraph 3 (*c*), practice and decisions and opinions from international tribunals seem to support the notion that, as a general rule, an interpreter should, where possible, interpret a treaty in such a way as that it does not conflict with a norm of *jus cogens* and thus render the treaty invalid. The Treaty of Guarantee between Cyprus, Greece, Turkey and the United Kingdom provides a good example.[145] Given the criticism of the reference to this treaty in the first report, it is necessary to pause here and recall that the reference to any State practice or decision of an international court, is not to be read as agreement with substance of that material. However, the Special Rapporteur cannot ignore practice simply because some States question it. Article IV of the Treaty of Guarantee provided as follows:

> In the event of a breach of the provisions of the present Treaty, Greece, Turkey and the United Kingdom undertake to consult together with respect to the representations or measures to ensure observance of those provisions.
>
> In so far as common or concerted action may not prove possible, each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty.

60. In 1963, Cyprus wrote a letter to the President of the Security Council complaining of acts of use of force by Turkey.[146] It had been argued by, in particular, Turkey and the United Kingdom, that article IV permitted use of force measures.[147] While the Treaty of Guarantee is often referred to as an example of a State (Cyprus) claiming the invalidity of a treaty, Cyprus did much more than that. It suggested that the treaty would be void for being in conflict with *jus cogens* if it were interpreted in a manner that permitted the unilateral use of force. In its statement before the Security Council, Cyprus observed as follows:

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[145] See, for discussion, Gaja, "*Jus cogens* beyond the Vienna Convention" (footnote 87 above), p. 288; Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (Helsinki, Finnish Lawyers' Publishing, 1988); Andrew Jacovides, "Treaties conflicting with peremptory norms of international law and the Zurich-London 'Agreements'" in *International Law and Diplomacy*, Andrew Jacovides, ed. (Leiden/Boston, Martinus Nijhoff, 2011).

[146] Letter dated 26 December 1963 from the representative of Cyprus to the President of the Security Council, document S/5488.

[147] See, e.g., United Kingdom, 1098th meeting, 27 February 1964 (S/PV.1098), paras. 66–68 and 79, noting that action taken under article IV would not be in violation of Article 2, paragraph 4, of the Charter of the United Nations. See also, generally, Turkey, 1095th meeting, 18 February 1963 (S/PV.1095). During the 1098th meeting, the Turkish Foreign Minister was quoted by the Cypriot Minister as having said: "Turkey decided to use her own right of unilateral intervention on the basis of Article IV of the Treaty of Guarantee" (S/PV.1098, para. 90).

> [T]he term "military intervention, use of force or threat of force" nowhere appears in the text of [article IV]. Turkey, however, appears to interpret this article as giving to it the right of unilateral military intervention … It is quite clear that article IV of the Treaty of Guarantee as interpreted by Turkey is contrary to peremptory norms of international law, *jus cogens*.[148]

61. Indeed, the United Kingdom, in its defence of the treaty, advances an interpretation that is consistent with the prohibition on the use of force — the *jus cogens* norm.[149] In its resolution in response to the debate, the Security Council did not make a declaration concerning the treaty, but did demand "an immediate end to foreign military intervention" and called upon the relevant States to "respect … the territorial integrity of Cyprus".[150] This does seem to suggest that the treaty was accorded a meaning that rendered it consistent with the *jus cogens* prohibiting the use of force. Similarly, the General Assembly also adopted a resolution calling on States to act "in conformity with" the *jus cogens* obligation in "Article 2, paragraphs 1 and 4" of the Charter of the United Nations.[151] The call for action consistent with *jus cogens* without impugning the treaty itself suggests an interpretation of the treaty that is consistent with *jus cogens*.

62. The Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco of 2006,[152] provides another illustration of the role of *jus cogens* for treaty interpretation. The territorial scope of this agreement potentially included the waters off Western Sahara, in disregard of the right to self-determination of the peoples of Western Sahara, a norm generally accepted as being *jus cogens*.[153] Before the General Court of the European Court of Justice, the Front Polisario successfully sought to have the Fisheries Partnership Agreement annulled on account of conflict with the right to self-determination.[154] On appeal, however, the Grand Chamber sought to interpret the Fisheries Partnership Agreement in such a manner as

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[148] 1098th meeting, 27 February 1964 (S/PV.1098), paras. 91–95. See also Greece, 1097th meeting (S/PV.1097), paras. 168–169.

[149] United Kingdom, 1098th meeting, 27 February 1964 (S/PV.1098), paras. 66–67.

[150] Security Council resolution 353 (1974), 20 July 1974, paras. 1 and 3.

[151] General Assembly resolution 2077 (XX), 18 December 1965, para. 2.

[152] See European Council regulation No. 764/2006 of 22 May 2006 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, *Official Journal of the European Union*, L 141/1 (29 May 2006).

[153] On the *jus cogens* character of the principle of self-determination, see para. (5) of the commentary to art. 26 of the draft articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 76–77. See also, specifically on the illegality of the agreement owing to inconsistency with the *jus cogens* principle of self-determination, Hans Corell, "The legality of exploring and exploiting natural resources in Western Sahara" in *Multilateralism and International Law with Western Sahara as a Case Study*, Neville Botha, Michèle Olivier and Delarey van Tonder, eds. (Pretoria, VerLoren van Thermaat Centre, 2008), pp. 242–243.

[154] *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v. Council of the European Union*, Case T-512/12, Judgment of the General Court (Eighth Chamber), European Court of Justice, 10 December 2015, para. 247 (the action of the Front Polisario "must be upheld and the contested decision must be annulled in so far as it approves the application of the agreement"). Para. 2 of the order itself (ibid., para. 251) reads as follows: "Declares that the Council Decision … on the conclusion of [the Fisheries Partnership Agreement] … is annulled in so far as it approves the application of that agreement to Western Sahara."

to make it consistent with the right to self-determination.[155] Although the Grand Chamber's decision relied, in part, on the *pacta tertiis* rule,[156] the overarching basis of the decision is the application of the principle of self-determination, which the Court described as a "one of the essential principles of international law" and an *obligatio erga omnes*.[157] The Court, invoking article 31, paragraph 3 (*c*), of the 1969 Vienna Convention, states that the principle must be taken into account in the interpretation of the Fisheries Partnership Agreement.[158] On the basis of, *inter alia*, this assessment, the Grand Chamber stated that "[i]t follows that the [Fisheries Partnership Agreement] could not be understood at the time of its conclusion as meaning that its territorial scope included the territory of Western Sahara".[159]

63. However, confirming caution expressed above that the application of this rule of interpretation "does not mean that the other elements of interpretation in the 1969 Vienna Convention can be ignored in order to achieve a meaning consistent with *jus cogens*",[160] the Grand Chamber specifically links its interpretation to the ordinary meaning of the words of the Fisheries Partnership Agreement.[161]

64. The *Oil Platforms* case also provides an example of the use of interpretation to avoid a meaning that is inconsistent with a norm of *jus cogens*.[162] The argument, in connection with interpretation of article XX of the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, was used more explicitly by the Islamic Republic of Iran, which made the following observations:

> Under Article 53 of the Vienna Convention ..., a provision of a treaty which conflicts with a norm of *jus cogens* is void ... That is to say, the treaty as a whole is void. These rigorous provisions must in turn generate a stringent principle of interpretation, so that any provision of a treaty is to be interpreted, if at all possible, so as not to conflict with such a rule.[163]

65. While the Court does not, itself, expressly refer to *jus cogens*, it did state that article XX, paragraph 1 (*d*), must be interpreted so as to be consistent with the

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[155] *Council of the European Union v. Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)*, Case C-104/16 P, Judgment of the Grand Chamber, European Court of Justice, 21 December 2016, *Official Journal of the European Union*, C 53/19 (20 February 2017). *Cf. Brita GmbH v. Hauptzollamt Hamburg Hafen*, Case C-381/08, Judgment of the Court (Fourth Chamber), European Court of Justice, 25 February 2010, *Official Journal of the European Union*, C 100/04 (17 April 2010).

[156] *Council of the European Union v. Front Polisario* (see previous footnote), para. 100.

[157] Ibid., para. 88.

[158] Ibid., paras. 89 and 86.

[159] Ibid., para. 112.

[160] See paragraph 58 of the present report.

[161] *Council of the European Union v. Front Polisario* (see footnote 155 above), paras. 94–96.

[162] *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 161.

[163] *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Reply and Defence to Counter-Claim Submitted by the Islamic Republic of Iran, vol. I, 10 March 1999, pp. 164–165. The Islamic Republic of Iran made a similar point in relation to a Security Council resolution during a meeting of the Security Council on the situation in the Republic of Bosnia and Herzegovina. See Iran (Islamic Republic of), 3370th meeting, 27 April 1994 (S/PV.1098 and Corr.1 and 2) ("Resolution 713 (1991), adopted under totally different circumstances and before the existence of the Republic of Bosnia and Herzegovina, cannot be interpreted now in a manner that would run counter to the Charter of the United Nations or to the principles of *jus cogens*. Such an interpretation would obviously render the resolution itself invalid and illegal").

prohibition on the use of force, another norm whose *jus cogens* status is generally accepted.[164] The Court stated that

> under the general rules of treaty interpretation ... interpretation must take into account "any relevant rules of international law applicable [to the parties]" ... The Court cannot accept that article XX, paragraph 1 (*d*) ... was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked ... in relation to an unlawful use of force.[165]

66. Judge Simma was more explicit in this regard. He, in his separate opinion, stated as follows:

> The Court, in paragraph 41 of the Judgment, thus accepts, and rightly so, the principle according to which the provisions of any treaty have to be interpreted and applied in the light of the treaty law applicable between the parties as well as of the rules of general international law ... If these general rules of international law are of a peremptory nature, as they undeniably are in our case, then the principle of interpretation just mentioned turns into a legally insurmountable limit to permissible treaty interpretation.[166]

67. The Commission itself has already recognized that a "strong interpretative" principle applies in relation to *jus cogens* norms in relation to a treaty interpretation. The Commission noted that, in cases where a conflict might arise between a treaty provision which, on the face of it, was lawful and a norm of *jus cogens*, such a case would be resolved because "peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts".[167]

68. The above analysis above may be summarized as follows: a provision in a treaty should, as far as possible, be interpreted in a way that renders it consistent with a peremptory norm of general international law (*jus cogens*).

4. The effects of peremptory norms of general international law (*jus cogens*) on reservations to treaties

69. The Commission has already addressed the relationship between *jus cogens* and reservations to treaties in its 2011 Guide to Practice on Reservations to Treaties.[168] The Guide to Practice, though not binding, was the result of concerted work by the Commission, was adopted relatively recently and is based on a broad range of materials, including State practice. It is the view of the Special Rapporteur that the Commission, as far as possible, should base its conclusions on this work.

70. It is perhaps useful to reproduce the guidelines in the Guide to Practice that relate to *jus cogens*:

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[164] On the *jus cogens* status of the prohibition of aggressive use of force, see paragraph (5) of the commentary to art. 26 of the draft articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two), and corrigendum.

[165] *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 161, at pp. 181–182, paras. 40–41.

[166] Ibid., Separate Opinion of Judge Simma, para. 9. See also paras. 8–9 of the dissenting opinion of Judge Al-Khasawneh.

[167] Para. (3) of the commentary to article 26 of the draft articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum.

[168] Guide to Practice on Reservations to Treaties, adopted by the Commission at its sixty-third session, Report of the Commission on the work of its sixty-third session, *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10, Addendum* (A/66/10/Add.1).

Guideline 4.4.3 *Absence of effect on a peremptory norm of general international law* (jus cogens)

1. A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply as such between the reserving State or organization and other States or international organizations.

2. A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.

71. The first paragraph follows from the normal operation of international law. A reservation formulated in respect of a treaty provision and which reflects a norm of *jus cogens* might, subject to the rules of international law on reservations to treaties, affect the applicability of the *treaty rule as such*, but it will have no effect on the norm of *jus cogens* that is reflected in the treaty rule. This is nothing special and does not even depend on the hierarchical superiority of the *jus cogens* norms. It flows from the fact that the treaty provision to which a reservation is being formulated, and the *jus cogens* norm in question, have a separate existence.[169] The guideline applies equally if the treaty rule in question is reflective of another treaty rule, customary international law or even a general principle of law.[170] What is important is that the Commission decided not to include a provision that a reservation to a treaty provision reflecting a norm of *jus cogens* is impermissible. Whether it is permissible or not will depend on whether it is consistent with the object and purpose of the treaty or is prohibited by the treaty.[171] As a caveat, it should be noted that, in the view of the Special Rapporteur, it is *difficult* (although not impossible) to conceive of a reservation to a treaty provision embodying a norm of *jus cogens* which would meet the requirements of article 19 of the 1969 Vienna Convention.[172] The Commission, however, did not agree and, for that reason, decided not to exclude the possibility of formulating a reservation to a treaty provision embodying a norm of *jus cogens*.[173]

72. Although guideline 4.4.3 does not prohibit, as such, reservations to treaty provisions that reflect or embody *jus cogens* norms, it does make plain that a State cannot escape the binding nature of a peremptory norm of *general international law* by formulating a reservation to a treaty provision reflecting that norm.

73. A different, but related, question concerns whether a reservation can validly be formulated over a provision relating to a dispute settlement or enforcement mechanism provision. In many ways, guideline 4.4.3 already answers that question.

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[169] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at pp. 93–94, para. 175.

[170] See Guide to Practice on Reservation to Treaties., guideline 3.1.5.3 ("The fact that a treaty provision reflects a rule of customary international law does not in itself constitute an obstacle to the formulation of a reservation"). See especially para. (19) of the commentary to guideline 3.1.5.3.

[171] See art. 19 of the 1969 Vienna Convention.

[172] See, e.g., Human Rights Committee, general comment No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/49/40), vol. I, annex V, para. 8. See also Kleinlein, "*Jus cogens* as the 'highest law'? Peremptory norms and legal hierarchies" (footnote 66 above), p. 174 ("Reservations over a multilateral treaty that are inconsistent with a peremptory norm are considered to be inadmissible").

[173] Guide to Practice on Reservations to Treaties, para. (17) of the commentary to guideline 3.1.5.3.

However, given the importance of the question, the issue is addressed more fully later in the present report.[174]

74. Paragraph 2 of guideline 4.4.3 concerns a reservation that is formulated not with respect to a treaty provision reflecting a *jus cogens* norm, but rather a reservation that would result in the treaty being applied in a manner contrary to a norm of *jus cogens*. The typical example identified in the commentary to guideline 4.4.3 is a reservation "intended to exclude a category of persons from benefiting from certain rights granted under a treaty".[175] The right to contraceptives is probably not a norm of *jus cogens*. Thus, the formulation of a reservation to a treaty provision thereon would not be a reservation from a norm of *jus cogens*. However, a reservation that limits the implementation of this right to a particular racial group, or excludes a particular racial group from the enjoyment of the treaty right, would fall foul of the generally recognized *jus cogens* norm prohibiting racial discrimination.[176]

75. A reservation that is intended to "exclude or modify the legal effect" of a treaty provision in a manner inconsistent with a *jus cogens* norm is invalid and without effect. As such, the State concerned would remain bound by the treaty provision, without the benefit of the reservation. It is true that the 1969 Vienna Convention is silent on the effects of an invalid reservation. Moreover, as the commentary to guideline 4.5 indicates, neither the drafting history of the 1969 Vienna Convention during the consideration by the Commission or the Vienna Conference provides any assistance.[177] As stipulated in guideline 4.5.1, a reservation that is invalid is "devoid of any legal effect". Such a reservation, however, does not affect the continued applicability of the treaty.

76. The discussion above may be summarized as follows:

(a) a reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply;

(b) a reservation that seeks to exclude or modify the legal effects of a treaty in a manner contrary to a peremptory norm of general international law (*jus cogens*) is invalid.

C. Consequences of peremptory norms of general international law (*jus cogens*) for the law of State responsibility

1. General

77. The most obvious consequences of *jus cogens* norms relate to treaties, primarily because the law relating to *jus cogens* developed largely as a result of the 1969 Vienna Convention, which codified the law of treaties. There also seems to be a significant

[174] See for discussion below paras. 133–136.

[175] Guide to Practice on Reservations to Treaties, para. (5) of commentary to guideline 4.4.3.

[176] See, e.g., para. (5) of the commentary to article 26 of the draft articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77.

[177] Guide to Practice on Reservations to Treaties, paras. (3)–(18) of commentary to guideline 4.5.

degree of consensus on the effects of *jus cogens* on the law of State responsibility.[178] This should also not come as a surprise, since the effects of *jus cogens* on the law on State responsibility have been addressed in the influential articles on responsibility of States for internationally wrongful acts, of 2001 (hereinafter, "articles on State responsibility").[179] Although it has been contended that *jus cogens* norms have no effect on the law on State responsibility,[180] this view is based on the assumption that "invalidity" and "non-derogation" are the only consequences of *jus cogens* norms.[181] However, there is no *a priori* reason why this must be so. Article 53 of the 1969 Vienna Convention, on which these views are based, refers to invalidity (of a treaty) as *a* consequence of peremptoriness, while derogation (or non-derogation) is used in the context of its definition, the particular nuances of which were described in the second report.

78. According to the articles on State responsibility, "obligations imposed on States by peremptory norms" concern "vital interests of the international community as a whole" and therefore "entail a stricter regime of responsibility than that applied to other internationally wrongful acts".[182] The articles identify two general consequences of *jus cogens* norms. The first consequence, in article 26 of the articles, is that the circumstances precluding wrongfulness, in chapter V, may not be relied upon to exclude the wrongfulness of any act contrary to a norm of *jus cogens*. Second, serious breaches of obligations arising from *jus cogens* norms affect the international community of States as a whole and thus create legal effects for third States.[183] This latter consequence itself is composed of the duties on all States, first, to cooperate to bring to an end breaches of *jus cogens* norms and, second, not to recognize situations created by breaches of *jus cogens* norms or to assist in maintaining that situation.[184] Although not expressly linked with *jus cogens* in the articles on State responsibility, the right of States, other than the State(s) directly injured by the breach, to invoke the responsibility of the State in breach is a potential consequence of *jus cogens*.

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[178] D'Aspremont, "*Jus cogens* as a social construct without pedigree" (see footnote 71 above), p. 94, for example, contrasts "new legal effects" with "the traditional non-derogability in the law of treaty or the consequences in the law of state responsibility in case of serious breaches of *jus cogens*". Similarly, those members of the Commission calling for an approach broader than the law of treaties in the consideration of the current topic have generally referred to the law on State responsibility. See report of the Commission on the work of its sixty-eighth session (A/71/10), para. 112.

[179] General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77.

[180] See, e.g., Knuchel, "*Jus cogens*: identification and enforcement of peremptory norms" (note 64 above), p. 180; Costelloe, *Legal Consequences of Peremptory Norms in International Law* (see footnote 60 above), pp. 185–186.

[181] Knuchel, "*Jus cogens*: identification and enforcement of peremptory norms" (note 64 above), p. 180 ("The peremptory character of *jus cogens* norms has no direct effect on State responsibility; it invalidates conflicting norms, not conflicting behaviors"); Costelloe, *Legal Consequences of Peremptory Norms in International Law* (see footnote 60 above), pp. 185–186 ("as a terminological matter, it is important to note ... that the breach, however serious, of an obligation under a peremptory norm does not 'derogate' from such a norm. The breach of an obligation under a peremptory norm entails the legal consequences of the breach of an ordinary obligation").

[182] Para. (7) of the commentary to article 12 of the draft articles on State responsibility.

[183] Ibid., Part Two, chap. III.

[184] Ibid., art. 41.

79. The Special Rapporteur pauses here to mention other potential consequences of breaches of *jus cogens* norms which, although related to State responsibility,[185] will not be addressed in the present chapter. These include issues such as the duty to prosecute or extradite, the duty to prosecute and the duty to deny immunities in relation to breaches of *jus cogens* norms. To his mind, these should more properly be considered as the effects of *jus cogens* norms on individual criminal responsibility because they are concerned less with State responsibility and more with individual accountability and criminal responsibility, which is addressed further below.

2. Non-applicability of circumstances precluding wrongfulness

80. Chapter V of Part One of the articles on State responsibility, entitled "Circumstances precluding wrongfulness", identifies six circumstances that would preclude wrongfulness of conduct that would, but for the presence of the circumstances, be wrongful. These are consent,[186] self-defence,[187] countermeasures,[188] *force majeure*,[189] distress[190] and necessity.[191] Article 26, however, provides that none of these circumstances would preclude wrongfulness if the obligation breached arose from a *jus cogens* norm.

81. Article 26 is a savings clause that precludes the reliance on chapter V of Part One to exclude wrongfulness in the case of obligations arising from norms of *jus cogens*. In other words, to the extent that the scope of a norm of *jus cogens* itself incorporates a ground precluding wrongfulness, the existence of such a ground would be relevant in determining whether that *jus cogens* norm has been breached. To take the prohibition on the use of force as an example, while a State could not depend on article 21 (self-defence) as a circumstance excluding the wrongfulness of the use of force, the right to self-defence is clearly relevant to the question of the responsibility of a State for the use of force since the use of force in self-defence would not be a breach of the *jus cogens* norm. Similarly, in *some cases*, consent by a State to the presence of the military of another States on the former's territory may exclude wrongfulness of an apparent breach of a peremptory norm.[192] These issues, however, concern more the scope of the norm of the peremptory norm in question, rather than the circumstances precluding wrongfulness, and *could* be considered in any future report addressing an illustrative list, if it were deemed appropriate to draw up such a list.

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[185] See, e.g., Costelloe, *Legal Consequences of Peremptory Norms in International Law* (see footnote 60 above), pp. 191–192, who discusses them under the law on State responsibility but dismisses them as consequences of *jus cogens*.

[186] Articles on State Responsibility, art. 20.

[187] Ibid., art. 21.

[188] Ibid., art. 22.

[189] Ibid., art. 23.

[190] Ibid., art. 24.

[191] Ibid., art. 25. See *Impregilo S.P.A. v. Argentine Republic*, International Centre for Settlement of Investment Disputes, Case No. ARB/07/17, Decision of the Ad Hoc Committee on the Application for Annulment of 24 January 2014, para. 203.

[192] See, e.g., Christopher J. Le Mon, "Unilateral intervention by invitation in civil wars: the effective control test tested", *New York University Journal of International Law and Policy*, vol. 35 (2002–2003), pp. 741–793; Eliav Lieblich, "Intervention and consent: consensual forcible interventions in internal armed conflicts as international agreements", *Boston University International Law Journal*, vol. 29 (2011), pp. 337–382, especially at pp. 364 and 366. This aspect is also considered in Costelloe, *Legal Consequences of Peremptory Norms in International Law* (see footnote 60 above), pp. 225–227.

82. The issue of consent, as a circumstance precluding wrongfulness, is particularly important. The exclusion of consent as a ground precluding wrongfulness, is an extension of the principles in the 1969 Vienna Convention. In the Convention, while a State loses a right to invoke the invalidity of a treaty by expressly or tacitly agreeing that the treaty remains valid (essentially consent to an invalid treaty), such consent to the application of an otherwise invalid treaty does not apply to treaties that are invalid on account of conflict with *jus cogens* norms.[193] The commentary to article 45 buttresses the principle as follows:

> Of particular significance [in respect of the validity of the waiver] is the question of consent given by an injured State following a breach of an obligation arising from a peremptory norm of general international law ...Since such a breach engages the interest of the international community as a whole, even the consent or acquiescence of the injured State does not preclude that interest from being expressed in order to ensure a settlement in conformity with international law.[194]

83. Although circumstances precluding wrongfulness are generally not applicable, it is important to make a distinction between *jus cogens* norms existing at the time of the act in question, on the one hand, and *jus cogens* norms that arise or emerge subsequent to the act in question. That distinction is recognized in the 1969 Vienna Convention. In particular, article 53 applies to existing norms, while article 64 applies to emerging norms. Articles 53 and 64 apply to validity of treaties and not to the question of State responsibility.

84. However, the consequences provided for in the 1969 Vienna Convention for the invalidity of treaties arising from existing and emerging peremptory norms are relevant for the law on State responsibility. The principle provided for in article 26 applies to acts in breach of an existing norm of *jus cogens* since, for acts in breach of existing norms of *jus cogens*, there is a duty to "[e]liminate as far as possible the consequences of any act".[195] However, for emerging *jus cogens* norms, the obligation is only to release parties from "further" performance.[196] Thus, before the emergence of the peremptory norm, there are no consequences for State responsibility for acting contrary to the (yet to be formed) norm of *jus cogens*. Indeed, the Convention recognizes that the emergence of a new *jus cogens* norm does "not affect any right, obligation or legal situation" provided that the "rights, obligations or situations may *thereafter* be maintained" consistent with *jus cogens*.[197] Again, the word "thereafter" indicates that the obligation to maintain the circumstances (rights, obligations and situations) applies after the emergence of the norm of *jus cogens*. Thus, in the same way that the emergence of a new peremptory norm has no retrospective effect for the law of treaties, it similarly does not have retrospective effect for law on State responsibility. Although there is no separate provision on retrospectivity, the commentaries to the articles on State responsibility do recognize the basic principle of non-retrospectivity with regard to new or emerging norms of *jus cogens*:

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[193] Art. 45 of the 1969 Vienna Convention.

[194] Articles on State responsibility, para. (4) of commentary to art. 45.

[195] Art. 71, para. 1, of the 1969 Vienna Convention.

[196] Ibid., art. 71, para. 2 (*a*).

[197] Ibid., art. 71, para. 2 (*b*) (emphasis added).

But even when a new peremptory norm of general international law comes into existence, as contemplated in article 64 of the 1969 Vienna Convention, this does not entail any retrospective assumption of responsibility.[198]

85. The discussion above may be summarized as follows:

(a) no circumstance may be advanced to preclude the wrongfulness of an act that is not in conformity with an obligation arising under a peremptory norm of general international law (*jus cogens*);

(b) the conclusion in (a) does not apply where a peremptory norm of general international law (*jus cogens*) emerges subsequent to the commission of an act in question.

3. Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)

(a) General

86. In addition to the normal consequences that flow from breach of international obligations, the articles on State responsibility identify a number of other particular consequences that flow from the breach of norms of *jus cogens*. Article 41 provides, first, that "States shall cooperate to bring to an end through lawful means any serious breach" of *jus cogens* norms.[199] Second, it provides that "[n]o State shall recognize as lawful a situation created by a serious breach" of a *jus cogens* norm "nor render aid or assistance in maintaining that situation".[200] These particular obligations flow from the breach of an obligation by one State, imposed on a third State (not directly injured). As Tomuschat notes, as a consequence of breach of *jus cogens* norms, "[t]hird States are authorised, or called upon, and in some instances even obligated to intervene and to take steps" to remedy the breach.[201]

87. The particular consequences of *jus cogens* norms identified in article 41 of the articles on State responsibility apply only to serious breaches of a *jus cogens* norm and not to all breaches.[202] Seriousness, according to the commentary to the articles, is based on the "scale or character" of the breach.[203] Thus not every breach is serious and qualifies for the special consequences in article 41. The article only applies to those that relate to *jus cogens* and are of a serious nature.[204]

88. Article 40 defines a serious breach of a peremptory norm as one involving "a gross or systematic" breach.[205] The word "gross" refers to the magnitude or intensity of the breach, while "systematic" refers to whether the breach has been carried out in a "organized and deliberate way".[206] The Commission has, in the context of crimes

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[198] Articles on State responsibility, para. (5) of commentary to article 13.
[199] Ibid., art. 41, para. 1.
[200] Ibid., art. 41, para. 2.
[201] Tomuschat, *The Fundamental Rules of the International Legal Order* (footnote 71 above), p. 429.
[202] Articles on State responsibility, art. 40, para. 1: "This chapter applies to the international responsibility which is entailed by a serious breach".
[203] Ibid., para. (1) of commentary to Part Two, chap. III.
[204] Ibid., para. (1) of commentary to art. 40.
[205] Ibid., art. 40, para. 2.
[206] Ibid., paras. (7)–(8) of commentary to art. 40.

against humanity, defined systematic as excluding "isolated or unconnected acts".[207] Similarly, in *Goiburú*, the Inter-American Court of Human Rights found that "prohibition of the forced disappearance of persons" was *jus cogens*,[208] and that the "State's international responsibility is increased when the disappearance forms part of a systematic pattern or practice applied or tolerated by the State".[209] It is sufficient, for the purposes of article 40, for the breach to satisfy either the intensity or systematic element of the definition.

89. The requirement for the breach to be serious does not apply to the principle that circumstances precluding wrongfulness are not applicable for breaches of *jus cogens* norms. Not only is this consistent with the ordinary meaning of the provision, but it makes sense, since the non-recognition of the circumstances precluding wrongfulness does not create extraordinary obligations on other third States as article 41 does. It is also understandable, given the far-reaching obligations imposed in article 41, for there to be a higher threshold. It would be difficult, for example, to expect States to "cooperate" in the manner foreseen in article 41 because of a single, *ad hoc* case of racial discrimination imputed to a State. The threshold requirement is not the first time that a threshold of seriousness has been applied to *jus cogens*-related consequences. In the *Military and Paramilitary Activities* case, the Court made a distinction between "the most grave forms of the use of force (those constituting an armed attack)" and "other less grave forms".[210]

(b) Duty to cooperate

90. The obligation to "cooperate to bring an end through lawful means" serious breaches of peremptory norms flows from the general duty to cooperate under international law.[211] Although, at the time of the adoption of the articles on State responsibility, the Commission expressed the view that the positive duty of cooperation expressed in article 41 was progressive development,[212] the Commission has since recognized such a duty as existing under general international law.[213] It has also been found to be an obligation flowing from a breach of *jus cogens* under

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[207] See draft articles on crimes against humanity, adopted on first reading, Report of the Commission on the work of its sixty-ninth session (A/72/10), paras. (15)–(16) of commentary to art. 3. Relying on the jurisprudence of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia, the Commission also observed that "systematic" denoted a sense of organization (ibid.).

[208] *Case of Goiburú et al. v. Paraguay (Merits, Reparations and Costs)*, Judgment, 22 September 2006, Inter-American Court of Human Rights, para. 84.

[209] Ibid., para. 82.

[210] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 101, para. 191.

[211] See, e.g., Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV) of 24 October 1970, annex, para. 1 ("States have the duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international cooperation free from discrimination based on such differences").

[212] Articles on State responsibility, para. (3) of commentary to art. 41 ("It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law").

[213] See, e.g., draft articles on the protection of persons in the event of disasters, with commentaries, Report of the Commission on its sixty-eighth session (A/71/10), para. (1) of commentary to art. 7 ("The duty to cooperate is well established as a principle of international law and can be found in numerous international instruments").

international law in the *Legal Consequences of the Construction of a Wall* advisory opinion of the International Court of Justice.[214] Similarly, in the *La Cantuta* case, the Inter-American Court of Human Rights identified "the duty of cooperation among States for" the purpose of eradicating breaches as a consequence of *jus cogens*.[215] Cooperation, by definition, implies concerted action by more than one State.[216] The duty might, therefore, refer to action taken under the international collective security system, such as the Security Council or General Assembly,[217] or the African Union.[218] In the *Legal Consequences of the Construction of a Wall* opinion, the Court, having found a breach of the right to self-determination of the Palestinian people,[219] made the following observation:

> [T]he Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime ...[220]

91. While cooperation is more likely to be taken under the collective security institution, the concept has a broader scope. Cooperation "to bring to an end" serious breaches of peremptory norms may be taken by other bodies and under instruments relevant to the particular peremptory norm. These might include, for example, the Committee against Torture under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or regional human rights bodies and mechanisms. They may also include "non-institutionalized" forms cooperation, such as a group of States acting together to bring about an end to the breach in question.[221] Indeed, the *Legal Consequences of the Construction of a Wall* opinion may be read to suggest that, over and above collective action, there is a duty on individual States,

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[214] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 200, para. 159 ("It is also for all States, while respecting the [Charter of the United Nations] and international law, to see to it that any impediment, resulting from the [breach] ... is brought to an end").

[215] *Case of La Cantuta v Perú (Merits, Reparations and Costs)*, Judgment, 29 November 2006, Inter-American Court of Human Rights, para. 160 ("As pointed out repeatedly, the acts involved in the instant case have violated peremptory norms of international law (*jus cogens*) ... In view of the nature and seriousness of the events ... the need to eradicate impunity reveals itself to the international community as a duty of cooperation among states").

[216] Articles on State responsibility, para. (3) of commentary to art. 41 ("What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches").

[217] Charter of the United Nations, Arts. 10 and 12 and Chap. VI and VII.

[218] Constitutive Act of the African Union, art. 4 (*h*), read with Chapter VIII of the Charter of the United Nations. See also Security Council resolution 2033 (2012).

[219] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* (see footnote 214 above), paras. 147, 149, 157 and 159.

[220] Ibid., para. 160.

[221] Articles on State responsibility, para. (1) of commentary to art. 41.

subject to the constraints of international law, to make efforts to bring situations created by the breach to an end.[222]

92. The unsuccessful attempt by Ethiopia and Liberia in the 1960s to have the mandate of South Africa over Namibia, then known as South West Africa, terminated is perhaps one of the earliest examples of non-institutional forms of cooperation to bring to an end a breach of the *jus cogens* norm of self-determination.[223] In its memorial, for example, Ethiopia contended that it had "a legal interest in seeing to it ... that the sacred trust of civilization created by the Mandate [was] not violated" and that members of the League of Nations were entitled "to institute proceedings to uphold the rights of inhabitants of the Territory".[224] The Court agreed that Ethiopia and Liberia had *locus standi* stating that "*the duty* and the right of ensuring the performance of this trust were given to the League with its Council, the Assembly ... and *all its* Members".[225] It is true that this decision was based on an agreement (the Mandate) and not general principles, but it has been an inspiration for the development of the idea of a right (and duty) of States to intervene to ensure compliance with *jus cogens* norms.

93. Paragraph 1 of article 41 of the articles on State responsibility contains within it an important qualifier, namely that the collective measures taken to "bring an end" to the breach of peremptory norms must themselves be lawful. This is important, particularly in the light of the broad scope of cooperation, identified above. Any use of force measures, for example, taken to "bring an end" the breach in question, must comply with the rules of international law in the sense that it must meet the requirements of (collective) self-defence or be authorized by the Security Council.

94. The above discussion can be summarized as follows:

(a) States have a duty to cooperate to bring to an end through lawful means any serious breach of a peremptory norm of general international law (*jus cogens*);

(b) a serious breach of a peremptory norm of general international law (*jus cogens*) involves a gross of systematic failure by the responsible State to fulfil the obligation;

(c) the envisioned cooperation can be carried out through institutionalized cooperation mechanisms or through *ad hoc* cooperative arrangements.

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[222] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* (see footnote 214 above), para. 159 ("It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end"). See also Mr Al-Kadhe (Iraq) during the 4503rd meeting of the Security Council, on 29 March 2002 (S/PV.4503) ("We appeal to the Security Council, to the international community and to all freedom-loving people throughout the world to condemn those acts strongly and to use every measure available in order to force that entity to act in accordance with international *jus cogens* to ensure that it is forced to withdraw immediately from the occupied Palestinian towns and territories").

[223] See, for discussion, Jean Allain, "Decolonisation as the source of the concepts of *jus cogens* and obligations *erga omnes*", *Ethiopian Yearbook of International Law 2016*, pp. 35–60.

[224] *I.C.J. Pleadings, Oral Arguments and Documents, South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, vol. I (1966), Memorial Submitted by the Government of Ethiopia, pp. 92–93.

[225] *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa), Preliminary Objections, Judgment of 21 December 1962, I.C.J. Reports 1962*, p. 319, at p. 336 (emphasis added).

(c) Duty not recognize or render assistance

95. Paragraph 2 of article 41 of the articles on State responsibility contains two separate obligations. The first is the obligation not to recognize as lawful situations created by a serious breach of a peremptory norm of international law. The second is the obligation not to render aid or assistance in maintaining the situation created by the serious breach of a peremptory norm of international law. While at the time of the adoption of the articles on State responsibility, the Commission took the view that the obligation to cooperate in paragraph 1 was progressive development, the obligations in paragraph 2 (non-recognition and non-assistance) were already seen by the Commission as constituting *lex lata*.[226] This position can be supported with reference to a number of sources, some of which were already referred to in the commentary to the articles on State responsibility.[227]

96. Although the *Namibia* opinion was based principally on the termination of the sacred trust of South Africa and the decisions of the organs of the United Nations, in particular the General Assembly and the Security Council, at its core it concerned the application of the right to self-determination.[228] The Court, in that advisory opinion, stated that the "qualification of a situation as illegal does not by itself put an end to it".[229] The Court determined, first, that South Africa, "being responsible for having created and maintained" the unlawful situation, "has the obligation to put an end to it".[230] Second, the Court declared that Member States of the United Nations were "under obligation to recognize the illegality and invalidity of South Africa's continued presence" and "refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia".[231] Although the *Namibia* advisory opinion was based principally on a Security Council resolution, that it also flowed from general international law, and in particular the *erga omnes* nature of *jus cogens* obligations, is evident from the fact that the Court determined that the obligations not to recognize and not to offer assistance "are opposable to all States in the sense of barring *erga omnes* the legality of a situation", i.e. such obligations were not opposable only to Member States of the United Nations.[232] The underlying rationale of this conclusion was summed up by the Court as follows:

> [A]ll States should bear in mind that the injured entity is a people which must look to the international community for assistance in its progress towards the goals for which the sacred trust was instituted [self-determination].[233]

97. The *Legal Consequences of the Construction of a Wall* advisory opinion provides yet another example of the Court's approach to legal obligations flowing

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[226] Articles on State responsibility, para. (6) of the commentary to art. 41 ("The existence of an obligation of non-recognition in response to serious breaches of obligations arising under peremptory norms *already* finds support in international practice and in decisions of [the International Court of Justice]" (emphasis added)). See also, in connection with the obligation of non-assistance, para. (12) of the commentary to art. 41.

[227] Articles on State responsibility, para. (8) of the commentary to art. 41.

[228] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, e.g., at p. 31, para. 52. See especially at para. 83, where the claim of South Africa to the territory of Namibia is said to be based on annexation, contrary to the norms of *jus cogens*.

[229] Ibid., para. 111.

[230] Ibid., para. 118.

[231] Ibid., para. 119. Examples of the types of assistance, aid and recognition are given in paragraphs 121–124.

[232] Ibid., para. 126.

[233] Ibid., para. 127.

from the breach of a *jus cogens* norm, namely the right to self-determination.[234] In addressing the consequences for Israel, the Court determined that Israel "has an obligation to put to an end the violation of its international obligations".[235] With respect to consequences for "other States", the Court observed that the right to self-determination was one that created *erga omnes* obligations and as such, is "the concern of all States".[236] Flowing from the "character and the importance of the rights and obligations involved", the Court determined that "all States are under an obligation not to recognize the illegal situation resulting from" the breach.[237] Furthermore, the Court held that States are also under an obligation "not to render aid or assistance in maintaining the situation created" by the breach.[238] The duties imposed on other third States in the event of a breach of a norm of *jus cogens* were also recognized in *Amnesty International v. Secretary of State for the Home Department*, wherein, relying on article 41 of the articles on State responsibility, the House of Lords of the United Kingdom stated that "it was a duty of States ... to reject the fruits of torture".[239] According to the House of Lords, this duty arose from the fact that that "the *jus cogens erga omnes* nature of the prohibition of torture requires member States to do more than eschew the practice of torture".[240]

98. Similar consequences can be gleaned from Security Council and General Assembly resolutions. For example, in its resolution 276 (1970), the Security Council, determined the "continued presence of the South Africa authorities in Namibia" to be illegal and "all acts taken by the Government of South Africa" to be invalid.[241] The resolution also called upon "all States ... to refrain from any dealings" with South Africa.[242] In other words, other States were called upon not to recognize the illegal situation created by the breach of the right of Namibia to self-determination. The General Assembly, in response to the judgment of the International Court of Justice in the *South West Africa* cases,[243] adopted resolution 2145 (XXI), which reaffirmed "the inalienable right to self-determination" of Namibia and that South Africa had violated this right.[244] As a consequence of this determination, the resolution called upon South Africa "forthwith to refrain and desist from any action ... which will in any manner whatsoever alter or tend to alter the present international status" of Namibia,[245] while also requesting "all States to extend their whole-hearted cooperation and to render assistance" to bring to an end the illegal occupation.[246] These resolutions, and their non-obligatory call for States not to recognize the

[234] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* (see footnote 214 above), paras. 122 and, especially, 155.

[235] Ibid., paras. 149–151.

[236] Ibid., paras. 154–155.

[237] Ibid., para. 159.

[238] Ibid.

[239] *A. Amnesty International and Commonwealth Lawyers Association v. Secretary of State for the Home Department*, Judgment of the House of Lords of 8 December 2005 [2006] 1 *All ER* 575, para. 34.

[240] Ibid.

[241] Security Council resolution 276 (1970), para. 2.

[242] Ibid., para. 3.

[243] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6. See Allain, "Decolonisation as the source of the concepts of *jus cogens* and obligations *erga omnes*" (footnote 223 above) ("More impressive than the rhetorical anger was the action of the General Assembly. On 27 October 1996, the Assembly reaffirmed the 'inalienable right of the people of South West Africa to freedom and independence'").

[244] General Assembly resolution 2145 (XXI) of 27 October 1966, paras. 1–3.

[245] Ibid., para. 7.

[246] Ibid., para. 9.

occupation by South Africa and to assist in bringing it to an end, can be seen as the antecedents of what could now be accepted as current general international law.[247] Another resolution directed at the policies of the Government of South Africa and, in particular the establishment of Bantustans (Homelands), provides yet another example of the call for non-recognition of a situation arising from the breach of a peremptory obligation (the prohibition of racial discrimination). General Assembly resolution 3411 (XXX) concerned the policies of apartheid of the Government of South Africa. Resolution 3411 D, which concerned Bantustans, condemned the establishment of Bantustans as "designed to consolidate the inhuman policies of *apartheid*, to perpetuate white minority domination and to dispossess the African people" of their inalienable right to self-determination.[248] Consequently, the resolution calls upon "all Governments and organizations not to deal with any institutions or authorities of the bantustans or to accord any form of recognition to them".[249]

99. The typical scenario of a situation created by breach of a norm of *jus cogens* might include the control of territory acquired through the unlawful use of force or the continued control of territory in conflict with the right of self-determination of peoples. Similarly, the acquisition of power on the basis of the commission of crimes against humanity or genocide might also be an example of a situation created by the breach of a norm of *jus cogens*. Thus, in addition to the unlawful act (the breach of *jus cogens*), the factual situation created by the breach is also tainted and should, under article 41 paragraph 2, of the articles on State responsibility, not be recognized. In the light thereof, the International Court of Justice in the *Legal Consequences of a Wall* advisory opinion determined that "all States are under an obligation not to recognize the illegal situation resulting" from the breach of obligations arising from *jus cogens*.[250] It also held that there was an obligation not to "render aid assistance or assistance in maintaining the situation" created by the breach.[251]

100. Paragraph 2 of article 41 is absolute in the sense that it applies to all States. It applies to the injured State, the State in breach of the peremptory norm and third States.[252] With respect to the injured State, it is confirmation of the principle that the injured State cannot consent to the breach of a *jus cogens* norm. With respect to third States, the obligation enforces the collective responsibility and the universal application of peremptory norms of international law. With respect to the States in breach, the obligation has the effect that the State is responsible for the initial breach (the breach of the *jus cogens* norm) and for any act recognizing or consolidating the situation created by the breach of the *jus cogens* norm. However, not every act arising from the breach of the *jus cogens* norm is to be unrecognized.[253] In the *Namibia* opinion, the International Court of Justice declared that the consequences of non-recognition should not negatively affect or disadvantage the affected population

[247] See also Opinion of the Advocate General Wathelet, 10 January 2018, on *Western Sahara Campaign UK, The Queen* v. *Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*, Case C-266/16, paras. 187 *et seq.*

[248] General Assembly resolution 3411 D of 28 November 1975 on Bantustans, para. 1.

[249] Ibid., para. 3.

[250] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* (see footnote 214 above), para. 159.

[251] Ibid.

[252] Articles on State responsibility, para. (9) of the commentary to art. 41.

[253] Ibid., para. (10) of the commentary to art. 41.

and, consequently, that acts related to the civilian population, such as registration of births, deaths and marriages, ought to be recognized notwithstanding the breach.[254]

101. It is noteworthy that the decisions and resolutions described above flow from the character and importance of the rules in question but not from the intensity or the systematic way in which the breach is carried out. While the duty to cooperate to bring to an end situations created by a breach requires positive concerted, perhaps onerous, action, the duty to not to recognize, aid or assist, merely requires State to abstain from conduct. It is thus understandable that the threshold in the case law is not as high as with respect to the duty to cooperate to bring to an end the situation created by a breach.

102. The above discussion may be summarized as follows:

(a) States have a duty not to recognize as lawful a situation created by a breach of a peremptory norm of general international law (*jus cogens*);

(b) States shall not render aid or assistance in the maintenance of a situation created by a breach of a peremptory norm of general international law (*jus cogens*).

4. Peremptory norms of general international law (*jus cogens*) and obligations *erga omnes*

103. The particular consequences of *jus cogens* norms described in article 41 of the articles on State responsibility were based on the relationship between *jus cogens* and *erga omnes* obligations. This conclusion seems clear from the commentary to chapter III of Part Two. Having described some of the key judgments involving *erga omnes* obligations, the Commission stated that a "closely related development is the recognition of the concept of peremptory norms of international law".[255]

104. The *Barcelona Traction* case was, perhaps, the most important development in the emergence of obligations *erga omnes* and their link with *jus cogens* norms.[256] In that case the Court drew a distinction between obligations of a State "arising vis-à-vis another State" and "obligations of a State towards the international community as a whole".[257] The latter, the Court said, concern all States and "all States can be held to have a legal interest in their protection; they are obligations *erga omnes*".[258] As explained above, the crucial element of the obligations in article 41 of the articles on State responsibility is that they extend responsibility for a breach of an obligation to third States, i.e., they apply beyond the State responsible for breach and the injured State.

105. While the Court does not refer to peremptory norms of general international law, it is clear from the Court's description that peremptory norms have an *erga omnes* effect. The Court makes a distinction between *erga omnes* obligations "conferred by

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[254] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion* (see footnote 228 above), para. 125.

[255] Articles on State responsibility, paras. (2)–(4) of the commentary to Part Two, chap. III.

[256] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3. See Allain, "Decolonisation as the source of the concepts of *jus cogens* and obligations *erga omnes*" (footnote 223 above), p. 53 ("the dictum [from *Barcelona Traction*] embedded the very concept of obligations *erga omnes* into the fabric of international law"); and Theodor Meron, "On a hierarchy of international human rights", *American Journal of International Law*, vol. 80 (1986), pp. 1–23, at p. 1.

[257] Ibid., para. 33.

[258] Ibid.

international instruments of a universal or quasi-universal character" on the one hand, and those that "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles of rules concerning the basic rights of the human person, including protection from slavery and racial discrimination", on the other.[259] All of the norms identified by the Court have been described as *jus cogens* norms. In the *East Timor (Portugal v. Australia)* case, the Court again held that another norm of *jus cogens* — this time the right of self-determination — "has an *erga omnes* character".[260] It is interesting to note that, in that case, the Court held that the *erga omnes* character of the norm had no effect on the jurisdiction of the Court[261] — this, however, is an issue that is considered later in the present report. The Court has made the link between *jus cogens* and *erga omnes* obligations even clearer in its judgment of 2015 in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*.[262] There, the Court confirmed its previous determination that "the Genocide Convention contains obligations *erga omnes*" and that "the prohibition of genocide has the character of a peremptory norm (*jus cogens*)".[263]

106. The link between *jus cogens* norms and *erga omnes* obligations has also been recognized in State practice. In *Nulyarimma and Others v. Thompson*, the Australian Federal Court recognized that the prohibition of genocide is a peremptory norm of customary international law giving rise to a non-derogable obligation by each State to the entire international community, and noted that it was an obligation that existed independent of the Convention on the Prevention and Punishment of the Crime of Genocide.[264] Similarly, in *Kane v. Winn*, the United States District Court of Massachusetts determined that "the prohibition against torture" is an obligation *erga omnes* that, "as *jus cogens* norm[s] ... [is] 'non-derogable and peremptory'".[265] During consideration of the Commission's report in the forty-ninth session of the General Assembly, the Czech Republic observed that "[*j*]*us cogens* obligations were *erga omnes* obligations, which did not allow for any derogation".[266]

[259] Ibid., para. 34.

[260] *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 90, at p. 102, para. 29.

[261] Ibid. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 595, at pp. 615–616, para. 31, the Court declared another norm of *jus cogens*, genocide, to create obligations *erga omnes*. See also *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (footnote 124 above), para. 64.

[262] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia), Judgment, I.C.J. Reports 2015*, p. 3.

[263] Ibid., para. 87.

[264] *Nulyarimma and Others v. Thompson*, Appeal Judgment of the Australian Federal Court of 1 September 1999, para. 18. In his opinion, Whitlam J. specifically, using the largely same language as the Court, specifically referred to the *erga omnes* nature of the obligation ("the prohibition of genocide is a peremptory norm of customary international law (*jus cogens*) giving rise to non derogable obligations *erga omnes* owed by each nation State to the international community as a whole"), para. 81.

[265] *Kane v. Winn*, Judgment of 27 May 2004 of the United States Court for the District of Massachusetts, 31 F. Suppl 2d 161 (D Mass), para. 93. *R and Office of the United Nations High Commissioner for Refugees v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Home Affairs*, Appeal Judgment of 12 October 2006 of the High Court, [2006] All ER (D) 138, para. 102, referring to "*ius cogens erga omnes*". See also *Jorgic case, I (a Bosnian Serb), Individual Complaint*, Judgment of 12 December 2000 of the German Constitutional Court, 2 BvR 1290/99, ILDC 132 (DE 2000), para. 17.

[266] Czech Republic (A/C.6/49/SR.26), para. 19. See also Burkina Faso (A/C.6/54/SR.26).

107. While the sources above are clear that there is a relationship between *jus cogens* and obligations *erga omnes*, what is more important is the precise nature of that relationship. It is generally accepted in the literature that, while *jus cogens* norms all have *erga omnes* effects, the reverse is not true, i.e. not all *erga omnes* obligations constitute *jus cogens* norms.[267] Villalpando provides a good image to describe the relationship between the two concepts:

> L'image désormais classique employée pour décrire la relation entre les obligations *erga omnes* et le *jus cogens* est celle de deux cercles concentriques: la catégorie des normes imposant des obligations *erga omnes* constituerait un ensemble plus grand qui contiendrait toutes les normes impératives, mais ne se réduirait pas à elles.[268]

108. While this idea has taken a strong foothold, its accuracy is, at the very least, doubtful. It raises the question of whether there are any *erga omnes* obligations that do not derive from *jus cogens* norms. It is true that treaty obligations, not flowing from peremptory norms of general international law, may create obligations owed to all parties to the treaties — so called *erga omnes inter partes* obligations. These, however, are not erga omnes obligations proper, as they do not create obligations owed to all States but to all States *parties*.[269] It seems, however, that the *Barcelona Traction* case does offer some hints as to the essential elements of the relationship. There, the Court states that the "obligations *derive* ... from" prohibitions constituting *jus cogens*.[270] Thus the two concepts are not the same. One derives, or flows, from another. In the view of the Special Rapporteur, this is the essence of the relationship. Pellet captures that essence as follows:

> 'Les règles fondamentales de l'ordre juridique international', en particulier le *jus cogens* et les obligations *erga omnes* — sans d'ailleurs que l'on sache très bien s'il s'agit d'un seul et même concept ou de deux différentes — même si pour ma part ... je pense qu'il s'agit de deux notions distinctes: le caractère

[267] See, e.g., Francisco Forrest Martin, "Delineating a hierarchical outline of international law sources and norms", *Saskatchewan Law Review*, vol. 65 (2002), pp. 333–368, at p. 353 ("Obligations *erga omnes* are distinct from *jus cogens* norms in that they *can* be derogable in some situations, although all *jus cogens* norms are obligations *erga omnes*"). See, however, Evan J. Criddle and Evan J. Fox-Decent, "A fiduciary duty of *jus cogens*", *Yale Journal of International Law*, vol. 34 (2009), pp. 331–388, at pp. 384–385, arguing against the very idea that *jus cogens* norms have *erga omnes* effect.

[268] Santiago Villalpando, *L'émergence de la communauté internationale dans de la responsabilité des États* (Paris, 2005), p. 107 ("The classical image used to describe the relationship between *erga omnes* obligations and *jus cogens* norms is that of concentric circles: the category of norms imposing obligations *erga omnes* would constitute a larger set that contains but is not limited to all peremptory norms").

[269] See, e.g., Tomuschat, *The Fundamental Rules of the International Legal Order* (footnote 71 above), p. 430 ("One may also speak in a somewhat looser fashion of obligations *erga omnes* with regard to any obligations deriving from a multilateral treaty. If this is done, however, the concept looses [*sic*] its explanatory essence as a guide to clarify the potential of sanctions at the disposal of the international community").

[270] *Barcelona Traction, Light and Power Company, Limited, Judgment* (footnote 256 above), para. 34 (emphasis added).

cogens d'une norme concerne la qualité du contenu même de celle-ci; l'expression *erga omnes* attire plutôt l'attention sur ses destinataires.[271]

109. Thus, for Pellet, *jus cogens* and *erga omnes* obligations are different concepts, but the one flows from the other, i.e. *jus cogens* norms deals with the content, while *erga omnes* obligations concern the addressees of *jus cogens* norms and thus follows from them. Similarly, Bassiouni stated that *jus cogens* "refers to the legal status" of particular norms, while "*obligatio erga omnes* pertains to the legal implications arising out of a ... characterization of *jus cogens*".[272]

110. The *erga omnes* character of *jus cogens* norms does not create obligations for third States — as article 41 of the articles on State responsibility does. Nonetheless, the *erga omnes* character of *jus cogens* explains the interest of third States in the wrongful act committed by one State against another. The legal consequence of obligations on third States are established by practice and the judicial decisions of international courts and tribunals, with impetus from the work of the Commission.

111. The above discussion may be summarized as follows: peremptory norms of general international law (*jus cogens*) establish obligations *erga omnes*, the breach of which concerns all States.

D. Other effects of peremptory norms of general international law (*jus cogens*)

112. The effects of *jus cogens* on treaties and State responsibility are, for the most part, based on the work of the Commission: the articles on the law of treaties and the articles on State responsibility. There are, however, other potential effects of *jus cogens* norms that should be considered and that have not been the subject of focused study by the Commission. These include the effects of *jus cogens* on:

(a) individual criminal responsibility in international criminal law;

(b) jurisdiction of international courts;

(c) customary international law;

(d) Security Council resolutions in the light of Article 103 of the Charter of the United Nations.

1. Effects of peremptory norms of general international law (*jus cogens*) on individual criminal responsibility in international criminal law

113. The effects of *jus cogens* on international criminal law, in general, and individual criminal responsibility, in particular, have been intensely debated in recent

[271] Alain Pellet, "Conclusions" in *The Fundamental Rules of the International Legal Order*, Tomuschat and Thouvenin (see footnote 66 above), p. 418 ("The fundamental rules of international law", particularly *jus cogens* and *erga omnes* obligations — without, however, knowing very well if they constitute a single concept or two different things — though, for my part, ... I think there are two separate concepts: the *jus cogens* character of a norm concerns the quality or the actual content of the norm; the expression *erga omnes* instead draws attention to its addressees").

[272] M. Cherif Bassiouni, "International crimes: *jus cogens* and *obligatio erga omnes*", *Law and Contemporary Problems*, vol. 59 (1996), pp. 63–74, at p. 63.

times.[273] For the most part, the issues that have been the subject of debate centre around the jurisdiction of domestic courts over crimes established by prohibitions under international law of a peremptory nature — sometimes referred to here, only for convenience, by the shorthand *jus cogens* crimes. These include the question of whether there exists a duty to exercise jurisdiction and the impact of immunities on *jus cogens* crimes.

114. The issues turn on the content and consequences of *jus cogens* crimes. Crimes the prohibition of which constitute *jus cogens* norms *include* crimes against humanity,[274] genocide,[275] war crimes,[276] and torture.[277] The Commission has already, under various topics, addressed some of those questions in connection with these crimes.[278] The present consideration of these issues will therefore be relatively brief.

115. It is perhaps useful to begin the consideration of whether *jus cogens* has particular consequences for the exercise of jurisdiction by noting that different instruments provide that States have a duty to exercise jurisdiction over the respective *jus cogens* crimes. The Convention on the Prevention and Punishment of the Crime of Genocide, for example, obliges State parties thereto "provide ... penalties for persons guilty of genocide".[279] The duty to punish in that Convention is of course a treaty obligation and does not necessarily apply beyond the treaty context. Nonetheless, in addition to the duty to punish in the Convention, there is ample State practice requiring the prosecution of the crime of genocide.[280] Moreover, there are also, in State practice, many examples of domestic prosecution of genocide or cases

[273] See, for arguments in favour of enhanced effects of *jus cogens* on individual criminal responsibility, Cassese, "For an enhanced role of *jus cogens*" (footnote 75 above) and Bassiouni, "International crimes: *jus cogens* and *obligatio erga omnes*" (footnote 272 above).

[274] Articles on State responsibility, para. (5) of commentary to art. 26; draft articles on crimes against humanity, preamble, especially para. (4) of the commentary to the preamble.

[275] Articles on State responsibility, para. (5) of commentary to art. 26; para. (4) of commentary to art. 40.

[276] Articles on State responsibility, para. (5) of commentary to art. 40; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Report 1996*, p. 226, at p. 257, para. 79.

[277] Articles on State responsibility, para. (5) of commentary to art. 26; para. (5) of commentary to art. 40; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, at p. 457, para. 99.

[278] Final report of the Commission on the obligation to extradite or prosecute (*aut dedere aut judicare*), Report of the Commission on the work of its sixty-sixth session (A/69/10), see especially paras. (45)–(48); draft articles on crimes against humanity, arts. 2, 4, 6, para. 5, and 10 and para. (8) of commentary to art. 10; draft articles on the immunity of officials from foreign criminal jurisdiction, Report of the Commission on the work of its sixty-ninth session (A/72/10), art. 7. See also third report on crimes against humanity by the Special Rapporteur (A/CN.4/704); fifth report on immunity of State officials from foreign criminal jurisdiction by the Special Rapporteur, Concepción Escobar Hernández (A/CN.4/701); second report of the Special Rapporteur, Mr. Roman Kolodkin, on the immunity of State officials from foreign criminal jurisdiction (A/CN.4/631).

[279] Convention on the Prevention and Punishment of the Crime of Genocide, art. 5. See also art. 4 ("Persons committing genocide ... shall be punished").

[280] See, e.g. Burkina Faso, Penal Code, Law No. 043/96/ADP of 13 November 1996, art. 313; Ethiopian Penal Code, art. 281; Ghana, Criminal Code Amendment Act of 1993, sect. 1; Rwanda, Organic Law No. 08/96 of 30 August 1996, art. 1; United States, 18 US Code § 1091; Brazil, Law No. 2.889 of 1 October 1956, art. 1; Nicaragua, Penal Code § 549; Fiji, Penal Code, Laws of Fiji, Chap. 17, sect. 69; Armenia, Criminal Code, art. 393; Switzerland, Penal Code, art. 264; Albania, Criminal Code, art. 73; Austria, Penal Code, Chap. 25, sect. 321; Estonia, Criminal Code, art. 611; Italy, Law No. 962 of 9 October 1967, art. 1; Spain, Penal Code, Book II, Title XXIV, art. 607.

permitting the prosecution of genocide.[281] The German Constitutional Court decision in *Jorgic* is particularly instructive. In that decision, the Court responded to the argument that the Convention on the Prevention and Punishment of the Crime of Genocide only permitted the exercise of jurisdiction by the territorial State. The Court concluded that the Convention did not preclude the exercise of universal jurisdiction, even though it did not oblige universal jurisdiction.[282]

116. There is equally a duty to prosecute war crimes under international law. The 1949 Geneva Conventions, with 196 Contracting Parties, provide both that the Parties are obliged "to enact any legislation necessary to provide effective sanctions" for commission of "grave breaches" and to "search for persons alleged to have committed" grave breaches and to "bring such persons, regardless of their nationality" before their courts.[283] Moreover, many States have, in their domestic laws, criminalized war crimes.[284]

117. In his second report on crimes against humanity, the Special Rapporteur for the topic provided useful information on the domestic laws for the prosecution of crimes

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[281] See, e.g., Ethiopia, *Special Prosecutor v. Hailemariam (Mengistu) and 173 Others*, Preliminary Objections, Criminal File No. 1/87, Judgment of Ethiopian Federal Court of 9 October 1995; Uganda, *Kwoyelo Alias Latoni v. Uganda*, Judgment of the Constitutional Court, 22 September 2011; Canada, *The Queen v. Munyaneza (Désiré)*, Trial Judgment of the Quebec Superior Court, 22 May 2009; Argentina, *Office of the Prosecutor v. Priebke (Erich)*, Judgment of Supreme Court, 2 November 1995; Bosnia and Herzegovina, *Prosecutor v. Trbić (Milorad)*, Judgment of the Criminal Division of the Court of Bosnia and Herzegovina, 16 October 2009; Spain, *Asociación de Familiares de Presos y Desaparecidos Saharauis (Association of Families of Saharawi Prisoners and Disappeared) and Others v. Hachem and Others*, Indictment Order, National Court, 9 April 2015; Spain, *Fundación Casa del Tibet and Others v Jiang (Zemin)*, Appeal Judgment on Admissibility by the National Court, 10 January 2006; Germany, *Sokolović*, Revision Judgment of the Federal Court of Justice, Criminal Division, 21 February 2001; Germany, *Jorgic*, Judgment of the Constitutional Court, 12 December 2000.

[282] *Jorgic* (see previous footnote), especially para. 40.

[283] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, art. 50; Geneva Convention Relative to the Treatment of Prisoners of War, art. 129; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 146.

[284] See examples of national legislation: Armenia, Penal Code, 2003, arts. 383, 386, 387 and 390; Bangladesh, International Crimes Tribunal Act of 1973, sect. 3; Bulgaria, Penal Code of 1968, arts. 410–415; China, Law Governing War Criminals, 1946, art. 3; Democratic Republic of the Congo, Code of Military Justice, 1972, arts. 262–264; Finland, Criminal Code, 1889 (amendment 212/2008), chap. 11, sect. 5 (1); Jordan, Military Penal Code, 2002 (amended in 2006), art. 41; Portugal, Penal Code, 1996, art. 242; South Africa, Implementation of the Geneva Conventions Act, 2012, sect. 5. See further Australia, Defence Force, *Law of Armed Conflict: Commanders Guide*, March 1994, sect. 1306 ("Nations are required to search out, prosecute, and if necessary, extradite individuals who are suspected of breaches of the law of armed conflict"); Canada, Law of the Judge Advocate General, *The Law of Armed Conflict at the Operational and Tactical Level*, 1999, sect. 5–2; Colombia, Ministry of Defence, *Derecho Internacional Humanitario: Manual Básico para las Personerías y las Fuerzas Armadas de Colombia*, 1995, p. 27; France, General de Corps d'Armée Voinot, *Fiche de Synthèse sur les Règles Applicables dans les Conflits Armés*, 1992, sect. 3.4; Germany, Federal Ministry of Defence, *Humanitäres Völkerrecht in Bewaffneten Konflikten*, 1996, sect. 803; Israel, Military Advocate General's Corps Command, *Rules of Warfare on the Battlefield*, 2006, p. 11; Russian Federation, Ministry of Defence, *Regulations on the Application of International Humanitarian Law by the Armed Forces of the Russian Federation*, 2001, sect. 86; South Africa, National Defence Force *Revised Civic Education Manual* 2004, chap. 4, sect. 57; Switzerland, Swiss Army, *Lois et Coutume de la Guerre (Extrait et Commentaire)* 1987, art. 198; United States, Department of the Navy, *The Commander's Handbook on the Law of Naval Operations*, 2007, sect. 6.2.6.

against humanity.[285] In the report, he noted that, while many States have national laws for crimes against humanity, many others do not.[286] He recorded that, as of 2013, around 104 States had domestic legislation expressly criminalizing crimes against humanity *as such*.[287] While the Special Rapporteur concludes from this that "it does not appear that States regard themselves as bound" to adopt national legislation criminalizing crimes against humanity,[288] 104 pieces of legislation is quite an impressive quantity of State practice. This number is all the more impressive since the Rome Statute of the International Criminal Court itself does not require the domestic criminalization of crimes against humanity (or any of the crimes) in the Statute.[289] This does not mean, necessarily, that there is a duty under customary international law to criminalize crimes against humanity — not without the requisite *opinio juris*. However, the substantial practice forms a strong basis for the evolution of such a duty (if it does not already exist). It was on this basis that the Commission decided to provide, in article 6 of the draft articles on crimes against humanity, that States shall "take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law", a provision that was widely welcomed by States.[290]

118. There is widespread practice, both in terms of quantity and geographical spread, of States exercising criminal jurisdiction of acts the prohibition of which constitutes a *jus cogens* norm, such as crimes against humanity, war crimes, genocide and torture.[291] The practice reveals, however, that, while in some States universal jurisdiction is exercised, the legislation in other States requires some connection to the State exercising jurisdiction. The legislation relating to war crimes provides a good illustration of the discrepancies in this regard.[292] In the United States, for example, while the war crimes legislation[293] provides that "[w]hoever" commits a war crime "whether inside or outside the United States" is liable to punishment,[294] this is limited to circumstances where "the person committing such a war crime is a member

[285] Second report on crimes against humanity by the Special Rapporteur (A/CN.4/690), paras. 17–19.

[286] Ibid., paras. 17–18.

[287] Ibid., para. 18. See also draft articles on crimes against humanity, para. (3) of commentary to art. 6.

[288] Ibid., para. 18.

[289] See, notwithstanding the fact that the Rome Statute itself does not create the duty to prosecute, cases in which States prosecuted crimes against humanity or asserted the right to do so: Democratic Republic of Congo, *Ituri District Military Prosecutor v. Kahwa Panga Mandro*, First Instance Judgment of the Military Tribunal, 2 August 2006; Mexico, *Federal Prosecutor assigned to the Special Office of the Attorney-General for Federal Crimes Committed by Public Servants against Persons Related to Past Social and Political Movements and Another v. Echeverría and Moya-Palencia*, Appeal Judgment of the Supreme Court of Justice, 15 June 2005; Peru, *Guillén de Rivero v. Peruvian Supreme Court*, Appeal Judgment of the Constitutional Court, 12 August 2005; Paraguay, *Pavon and Others v. Criminal Public Prosecutor*, Judgment of the Constitutional Chamber of the Supreme Court, 5 May 2008; Chile, *Re Víctor Raúl Pinto v. Relatives of Tomás Rojas*, Decision on Annulment of the Supreme Court of 2007, para. 23.

[290] See third report on crimes against humanity by the Special Rapporteur (A/CN.4/704), para. 4.

[291] With respect to torture see *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment* (see footnote 277 above), para. 99 (the prohibition of torture "has been introduced into the domestic law of almost all States").

[292] See footnote 284 above.

[293] 18 US Code, sect. 2441.

[294] Ibid., para. (a).

of the Armed Forces of the United States or a national of the United States".[295] The South African Act implementing the Rome Statute, however, provides for jurisdiction, even in the absence of a connection to South Africa, if the person alleged to have committed the offence, "after the commission of the crime, is present in the territory of" South Africa.[296] Such differences in approach are also reflected in the work of the Commission. In 1996, the Commission obliged States to establish jurisdiction over *jus cogens* crimes "irrespective of where or by whom those crimes were committed".[297] In its most recent relevant text, the Commission provided for an obligation on States to establish jurisdiction in cases where: (a) the "offence is committed in any territory" under that State's jurisdiction; (b) the "offender is a national of that State" or in the event of stateless persons, "is habitually resident in that State's territory"; and (c) "when the victim is a national of that State if that State considers it appropriate".[298] The most recent text, the draft articles on crimes against humanity, leaves open the possibility that a State may exercise broader jurisdiction, for example, universal jurisdiction, if permitted by international law.[299]

119. While it is generally accepted that there exists a duty to prosecute, Costelloe has refuted this general duty on the following basis:

> In *Questions Relating to the Obligation to Prosecute or Extradite*, the International Court [of Justice] found, noting that while the "prohibition of torture" [is *jus cogens*], that "the obligation to prosecute the alleged perpetrators

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[295] Ibid. See South Africa, *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre and Another*, Judgment of the Constitutional Court of South Africa, CCT 02/14. Dire Tladi, "National Commissioner of the South Africa Police Service v. Southern African Human Rights Litigation Centre (Sup. Ct. S. Afr.) — Introductory Note", *International Legal Materials*, vol. 54 (2015), pp. 152–174. See also United Kingdom, International Criminal Court Act 2001, sect. 51 (2), which provides that the section applies to "acts committed in England or Wales" or to acts committed "outside the United Kingdom, by a United Kingdom national, a United Kingdom resident or a person subject to [United Kingdom] service jurisdiction". Japan, Penal Code Law No. 45 of 1907 as amended, arts. 1–3, which includes jurisdiction over Japanese non-nationals for acts committed abroad only if committed against Japanese nationals (www.loc.gov/law/help/crimes-against-humanity/index.php#japan). Republic of Korea, Act on the Punishment of Crimes within the Jurisdiction of the International Criminal Court (Republic of Korea), art. 3 provides for the exercise of jurisdiction over acts (a) committed in the territory of the Republic of Korea; (b) outside the territory of the Republic of Korea by a national; (c) committed aboard vessels or aircrafts of the Republic of Korea by a foreigner; and (d) committed against the Republic of Korea or its nationals outside the territory of the Republic of Korea by a foreigner.

[296] See sect. 4 (3) of the Implementation of the Rome Statute Act of South Africa, 2002. See, for discussion, South Africa, *National Commissioner of Police v. Southern African Litigation Centre* (footnote 295 above). See further Finland, Criminal Code (footnote 284 above), chap. 11, sect. 5, which refers only to "a person". See also Germany, Act to Introduce the Code of Crimes against International Law, June 2002, sect. 1 ("This Act shall apply to all criminal offences against international law designated under this Act as serious offences ... even when the offence was committed abroad and bears no relation to Germany"). Canada, Crimes against Humanity and War Crimes Act, 2000, chap. 24, sect. 4 (b), provides that Canada may exercise jurisdiction over crimes committed outside Canada by foreigners if "after the time the offence is alleged is said to have been committed, the person is present in Canada".

[297] Draft code of crimes against the peace and security of mankind, *Yearbook ... 1996*, vol. II (Part Two), art. 8.

[298] Draft articles on crimes against humanity, art. 7.

[299] Ibid., art. 7, para. 3.

of acts of torture under the Convention applies only to facts having occurred after its entry into force for the State concerned".[300]

120. While this statement is true, it ignores that the Court is limiting itself to the duty to prosecute the alleged offender *under the Convention*, i.e. the Court is concerned with the treaty obligation and not an obligation under general international law. The reason for this is obvious. The jurisdiction of the Court in that case was limited to the breaches of the Convention and excluded breaches of customary international law, including *jus cogens*.[301] The Court's statement is thus not a general statement about the duty to exercise jurisdiction over torture, but rather about the duty under Convention.

2. Effects of peremptory norms of general international law (*jus cogens*) on immunity

121. Perhaps no other potential consequence has been more controversial and topical than the effect that *jus cogens* norms have on the immunity of States and immunity of officials.[302] The question of immunity and *jus cogens* crimes has been the subject of numerous decisions of international and regional courts and tribunals, domestic

[300] Costelloe, *Legal Consequences of Peremptory Norms in International Law* (see footnote 60 above), p. 191.

[301] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment* (see footnote 277 above), para. 55 ("at the time of the filing of the Application, the dispute between the Parties did not relate to breaches of obligations under customary international law and that it thus has no jurisdiction to decide on Belgium's claim thereto. It is thus only with regard to the dispute concerning the interpretation and application of ... the Convention against Torture that the Court will have to find whether there exists a legal basis of jurisdiction"). See also ibid., para. 63.

[302] For some selected literature, see Antonio Cassese, "When may senior State officials be tried for international crimes? Some comments on the *Congo v. Belgium* case", *European Journal of International Law*, vol. 13 (2002), pp. 853–875; Dapo Akande and Sangeeta Shah, "Immunities of State officials, international crimes, and foreign domestic courts", *European Journal of International Law*, vol. 21 (2011), pp. 815–852; Thomas Weatherall, "*Jus cogens* and sovereign immunity: reconciling divergence in contemporary jurisprudence", *Georgetown Journal of International Law*, vol. 46 (2015), pp. 1151–1212; A.P.V. Rogers, "War crimes trials under the Royal Warrant: British Practice 1945-1949", *International and Comparative Law Quarterly*, vol. 39 (1990), pp. 780–800; Annemarieke Vermeer-Künzli, "Immunities and consent to jurisdiction in international law", in *The Pursuit of a Brave New World In International Law: Essays in Honour of John Dugard*, Tiyanjana Maluwa, Max du Plessis and Dire Tladi, eds. (Leiden, Brill, 2017), pp. 172–192, at pp. 180 *et seq.*; Paul B. Stephan, "The political economy of *jus cogens*", *Vanderbilt Journal of Transnational Law*, vol. 44 (2011), pp. 1073–1104, at pp. 1074–1080 and 1092–1093; Kawasaki, "A brief note on the legal effects of *jus cogens* in international law" (footnote 75 above), p. 31; Andrea Bianchi, "Human rights and the magic of *jus cogens*", *European Journal of International Law*, vol. 19 (2008), pp. 491–508; Kolb, *Peremptory international law — jus cogens* (footnote 62 above); Costelloe, *Legal Consequences of Peremptory Norms in International Law* (footnote 60 above), pp. 259 *et seq.*; Knuchel, "*Jus cogens*: identification and enforcement of peremptory norms" (footnote 64 above), p. 202; Linderfalk, "Understanding the *jus cogens* debate" (footnote 58 above), p. 54; Orakhelashvili, "Audience and authority" (footnote 69 above), pp. 138 *et seq.*; Santalla Vargas, "In quest of the practical value of *jus cogens* norms" (footnote 60 above), pp. 218 *et seq.*

courts and also debates within the Commission.[303] The present report will therefore not repeat the debate in full, but will merely point out salient features that could assist the Commission in addressing the question of the legal consequences of *jus cogens* norms on immunities.

122. In her fifth report on immunity of State officials,[304] the Special Rapporteur for the topic proposed a draft article that provided the non-applicability of immunity *ratione materiae* for *jus cogens* crimes, which the Commission, albeit in a significantly amended form, adopted after a vote in which 21 members voted in favour of the article and 8 voted against, with 1 abstention.[305] In the context of the debate, the Special Rapporteur on *jus cogens*, expressed the view that, while he supported exceptions to immunity *ratione materiae* for violations of *jus cogens* crimes, he was not convinced by the authorities advanced in the fifth report on immunities.[306] The present report will not repeat those views save to say that the content of what follows is consistent with those views.

123. In assessing this issue, it is necessary to make several distinctions, some of which are often ignored. First, it is important to make a distinction, as the Commission did in the topic of crimes against humanity, between immunities and irrelevance of official capacity for responsibility for *jus cogens* crimes.[307] The former is a procedural hurdle to jurisdiction, while the latter has a substantive effect.[308] With respect to the latter, official capacity cannot serve as a substantive defence against the responsibility for *jus cogens* crimes. Second, with respect to immunity, a less controversial distinction should be made between immunity *ratione personae* and immunity *ratione*

[303] For judgments of international courts, see, famously, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, and *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99. For examples of regional court judgments, see: *Jones and Others v. the United Kingdom*, Nos. 34356/06 and 40528/06, European Court of Human Rights, ECHR 2014; *Al-Adsani v. the United Kingdom* [GC], No. 35763/97, European Court of Human Rights, ECHR 2001-XI. For the work of this Commission on issues pertaining immunities, see, in addition to the materials cited in footnote 278, debates of the Commission on the fifth report on the immunity of State officials from foreign criminal jurisdiction (A/CN.4/701) in A/CN.4/SR.3360–3365, SR.3378 and 3387–3388.

[304] A/CN.4/701, annex III.

[305] A/CN.4/SR.3378.

[306] A/CN.4/SR.3361.

[307] See draft articles on crimes against humanity, art. 6, para. 5 ("Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed by a person holding an official is not a ground for excluding criminal responsibility"). See, however, *Prosecutor v. Omar Hassan Ahmad al-Bashir, Decision under Article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the court for the arrest and surrender of Omar al-Bashir*, Case No. ICC-02/05-01/09, 6 July 2017, separate opinion of Judge Marc Perrin de Brichambaut, para. 22.

[308] Draft articles on crimes against humanity, see, especially, para. (31) of commentary to art. 6 ("For the purposes of the present draft articles, paragraph 5 means that an alleged offender cannot raise the fact of his or her official position as a substantive defence so as to negate any criminal responsibility. By contrast, paragraph 5 has no effect on any procedural immunity that a foreign State official may enjoy before a national criminal jurisdiction"). See also Dire Tladi, "Of heroes and villains, angels and demons: the ICC/AU tension revisited", *German Yearbook of International Law* (forthcoming), commenting on the separate opinion of Judge Marc Perrin de Brichambaut.

materiae.[309] It is generally accepted that there are no exceptions, even for *jus cogens* crimes, with respect to immunity *ratione personae*.[310] An interesting case in this respect is the South African Supreme Court of Appeal decision in *Minister of Justice v. South African Litigation Centre*,[311] which, as a subsidiary means for the determination of rules of international law,[312] stands for the proposition that there are no exceptions to immunity *ratione personae* under customary international law, even if State practice provides for an exception to that rule based on South African legislation. Be that as it may, the decision itself recognizes that it cannot make customary international law[313] and it remains an isolated example in support of an exception to immunity *ratione personae* for *jus cogens* crimes. It can therefore be accepted that, as the law currently stands, there are no exceptions to immunity *ratione personae* on account of the *jus cogens* character of the crime in question. The real issue, therefore, is whether *jus cogens* crimes exclude the applicability of immunity *ratione materiae*.

124. Commentators, by and large, base their conclusions on the State practice and decisions of international courts and tribunals related to civil process. The oft-cited judgment of the International Court of Justice, in which it was held that there was no "direct conflict" between immunity rules and *jus cogens* norms, because *jus cogens* norms provided substantive prohibitions on State conduct, while immunities were procedural in nature and operated on a different plane,[314] concerned immunity from civil jurisdiction. Moreover, it will be observed that all evidence relied on by the Court as State practice in the *Jurisdictional Immunities of the State* case were also concerned with immunity from civil jurisdiction.[315] Those supporting an exception to immunity on account of jus cogens also refer, often, to national cases relating to civil

[309] See arts. 3 and 4 of draft articles on immunity of State officials from foreign criminal jurisdiction. See also United Kingdom, *R v. Bartle and the Commissioner of Police for the Police and Others. Ex Parte Pinochet*, Judgment of the House of Lords of 24 March 1999, reproduced in *International Legal Materials*, vol. 38 (1999), p. 581, Opinion of Lord Phillips, at p. 653, noting that if Pinochet were still Head of State, he would be in a position to rely on immunity *ratione personae*.

[310] See draft articles on immunity of State officials from foreign criminal jurisdiction, art. 7, and especially para. (2) of commentary thereto. See, more importantly, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment* (footnote 303 above).

[311] *Minister of Justice and Constitutional Development and Others v. Southern African Litigation Centre and Others*, Judgment of the South African Supreme Court of Appeal, 2016 (4) *BCLR* 487 (SCA).

[312] Ibid., para. 84 ("I must conclude with regret that it would go too far to say that there is no longer sovereign immunity for *jus cogens* (immutable norm) violations. Consideration of [the] cases and the literature goes no further than showing that Professor Dugard is correct when he says that 'customary international law is in a state of flux in respect of immunity, both criminal and civil, for acts of violation of norms of *jus cogens*'. In those circumstances I am unable to hold that at this stage of the development of customary international law there is an international crimes exception to the immunity and inviolability that heads of state enjoy when visiting foreign countries and before foreign national Courts.").

[313] Ibid. ("But the content of customary international law is not for me to determine").

[314] See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment* (footnote 303 above), para. 95. Other judgments concerning civil proceedings that are often cited in support of the contention that there are no exceptions to immunity *ratione materiae* even for *jus cogens* crimes, include *Jones and Others v. the United Kingdom* (footnote 303 above) and *Al-Adsani v. the United Kingdom* (footnote 303 above).

[315] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment* (footnote 303 above), paras. 70 (national legislation) and 96 (case law).

proceedings.[316] It is practice related to criminal responsibility that must form the basis of any international law rule relating to exceptions to immunity on account of *jus cogens* crimes.

125. There are, of course, many cases involving the invocation of immunity *ratione materiae* in the context of criminal proceedings before domestic courts.[317] Rogers, for example, considers a number of cases under the 1945 Royal Warrant of the United Kingdom, decreed for the purposes of bringing to trial war criminals from the Second World War.[318] Those prosecuted included military personnel of foreign States who would, most certainly, have possessed immunity *ratione materiae*.[319] Cassese also provides a catalogue of domestic courts' jurisprudence in which immunity *ratione materiae* was lifted for *jus cogens* crimes.[320] Some of the more famous cases in which persons ostensibly with immunity *ratione materiae* were subject to the jurisdiction of domestic courts include the *Eichmann* trial (Israel),[321] *Barbie* (France),[322] *Bouterse* (the Netherlands) — although the latter was overturned, not owing to the immunity question, but solely owing to the rule against retroactive application of the law —,[323] *Pinochet* (Spain), *Guatemala Genocide case* (Spain),[324] *Scilingo* (Spain),[325] among others. Perhaps the case most synonymous with the principle of loss of immunity *ratione materiae* for purposes of *jus cogens* crimes is the *Pinochet* case in the United Kingdom. In that case Lord Brown-Wilkinson, Lord Hope and Lord Phillips, in their opinions, all emphasized the non-applicability of immunity *ratione materiae* to an international crime of a *jus cogens* nature.[326]

126. In the context of the Commission's consideration of the immunity of State officials, some members of the Commission pointed out that *Bouterse* and *Pinochet* did not support the contention that immunity *ratione materiae* was inapplicable.[327] As noted above, however, the Supreme Court of Appeal of the Netherlands did not overturn the judgment in *Bouterse* on account of immunity. The judgment was

[316] See, as an example of civil proceedings-related case denying immunity on account of *jus cogens* nature of the crime, *Yousuf v. Samantar*, 699 F.3d 763, 776-77 (4th Cir. 2012).

[317] See para. (5) of the commentary to art. 7 of the draft articles on immunity of State officials from foreign criminal jurisdiction, Report of the Commission on the work of its sixty-ninth session (A/72/10) especially footnote 762.

[318] See, for a discussion of thereof, Rogers, "War crimes trials under the Royal Warrant" (footnote 302 above), especially pp. 790 *et seq.*

[319] See, ibid., referring to *Rauer and Others*, *Pelcus* trial, the trials of Helmuth von Ruchteschell and von Manstein.

[320] Cassese, "When may senior State officials be tried for international crimes?" (see footnote 302 above), pp. 870 *et seq.*

[321] Israel, *Attorney-General of the Government of Israel v. Eichmann*, Judgment of the Supreme Court, English translation available in *International Law Reports*, vol. 36 (1968), p. 277.

[322] See for further discussion, Nicholas R. Doman, "Aftermath of Nuremburg: the trial of Klaus Barbie", *University of Colorado Law Review*, vol. 60 (1989), pp. 449–469.

[323] Netherlands, *Bouterse*, Judgment of the Supreme Court of 18 September 2001.

[324] Spain, *Guatemala Genocide: Menchú Tumm and Others v. Two Guatemalan Government Officials and Six Members of the Guatemalan Military*, Judgment of the Constitutional Court of 26 September 2005.

[325] Spain, *Scilingo Manzorro (Adolfo Francisco) v. Spain*, Judgment of the Supreme Court of 1 October 2007.

[326] United Kingdom, *R v. Bartle and the Commissioner of Police for the Police and Others. Ex Parte Pinochet* (see footnote 309 above), opinion of Lord Brown-Wilkinson (para. 56), opinion of Lord Hope (para. 196), opinion of Lord Millet (paras. 330 *et seq.*) and opinion of Lord Phillips (para. 366).

[327] Draft articles on immunity of State officials from foreign criminal jurisdiction, para. (8) of commentary to art. 7, Report of the Commission on the work of its sixty-ninth session (A/72/10), especially footnote 765.

overturned on account of the principle of non-retroactive application of laws. Immunity is a procedural bar to prosecution that prohibits the consideration of the substantive issues. The consideration itself of whether the laws could be applied retrospectively indicates the non-applicability of immunity. It should be recalled that what is at issue is *not* whether the Court stated that immunity is or is not applicable. What is at issue is whether the court exercised jurisdiction; in this case, it clearly did but found there were no grounds for prosecution because the law could not be applied retroactively. With respect to *Pinochet*, some members have pointed out that the opinions were not based on *jus cogens* as such but rather on a treaty obligation. However, as pointed out above, three of the opinions specifically raised the *jus cogens* nature of the crime as a basis for the non-applicability of immunity. Moreover, they were all based on the nature of the crime — torture — which has been widely accepted to be a *jus cogens* crime.[328] These members also disputed the relevance of legislation implementing the Rome Statute.[329] This, however, *might* be true only with respect to the provisions of domestic law implementing obligations under the Rome Statute. Thus, the exclusion of immunity for the purposes of arrest and eventual surrender to the International Criminal Court, being an obligation under the Rome Statute, *could* be irrelevant to the question of immunity under domestic law. However, since the Rome Statute does not obligate any State to prosecute individuals under the Rome Statute, let alone officials with immunity, any legislation providing for the non-applicability of immunity will be relevant for determining the rules of general international law.

127. There are, of course, national court cases upholding immunity in criminal proceedings. The French Court of Cassation, for example, held that "qu'en l'état du droit international, le crime dénoncé, quelle qu'en soit la gravité, ne relève pas des exceptions au principe de l'immunité de juridiction des chefs d'État étrangers en exercice".[330] Similarly, in several post-*Pinochet* judgments, the British courts have upheld immunity of State officials.[331] It will be noted, however, that these decisions involve incumbent heads of State entitled to immunity *ratione personae*. Both the *Gaddafi* and *Mugabe* decisions suggest that, were the relevant officials to no longer occupy their positions as heads of State — a scenario under which the Commission has determined immunity *ratione materiae* would apply[332] — the immunity would not be upheld. In *Gaddafi*, for example, the Court explicitly stated that the protection offered by the immunity is for "*incumbent* heads of State". In *Mugabe*, the Court

[328] See, e.g., *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment* (footnote 277 above), para. 99.

[329] Draft articles on immunity of State officials from foreign criminal jurisdiction, para. (8) of commentary to art. 7, Report of the Commission on the work of its sixty-ninth session (A/72/10), especially footnote 765.

[330] France, *Gaddafi*, Judgment of the French Court of Cassation of 13 March 2001 (No. 00-87215) *International Law Reports*, vol. 125 (2001), p. 490, para. 9 ("Under international law, regardless of the gravity of the crime denounced, there is no exception to the principle of immunity from jurisdiction for incumbent heads of State in foreign courts"). See also Belgium, *H.S.A et al. v. S.A. et al (Ariel Sharon* case), Judgment of the Court of Cassation, 12 February 2003, No. P.02.1139.F, pp. 599–600.

[331] United Kingdom, Decision *In Re Mugabe*, Judgment of 14 January 2004, Bow Street Magistrates Court ("I am satisfied that that Robert Mugabe is President and Head of State of Zimbabwe and is entitled whilst he is Head of State to that immunity. He is not liable to any form of arrest or detention and I am therefore unable to issue the warrant that has been applied for").

[332] Draft articles on immunity of State officials from foreign criminal jurisdiction, para. (3) of art. 6, Report of the Commission on the work of its sixty-eighth session (A/71/10).

stated that the applicable immunity can only be relied upon by Mugabe "*whilst* he is head of State" (emphasis added).

128. There have, of course, been decisions upholding immunity of non-heads of State. These include cases decided by the British Magistrates Court in *Re Bo Xilai* and *Re Mofaz*.[133] Yet, in both of these cases, the courts proceeded from the premise, rightly or wrongly, that the officials in question, the Minister of Defence (Mofaz) and the Minister of Commerce and Trade (Bo Xilai) were entitled to immunity *ratione personae*. In *Mofaz* for example, the court concluded that "a Defence Minister would automatically acquire … immunity in the same way as that pertaining to a Foreign Minister". Similarly, in *Bo Xilai*, having recalled the judgment of the International Court of Justice in the *Arrest Warrant* case, the Court determined that the Chinese Minister of Commerce's functions were "equivalent to those exercised by a Foreign Minister".

129. Perhaps the best example of a national case upholding immunity *ratione materiae* is the case of Hissène Habré's extradition request.[134] In that case, Habré, as a former Head of State, no longer enjoyed immunity *ratione personae* but only (the residual) immunity *ratione materiae*. There, the Court determined that, although Habré was no longer Head of State, the immunity that he had enjoyed remained.[135] Although this decision most definitely serves as a practice, it should be pointed out that the decision erroneously relied on the *Arrest Warrant* case.[136] While in the case of Habré the relevant immunity was immunity *ratione materiae*, the *Arrest Warrant* case concerned immunity *ratione personae*. Indeed, the majority judgment in the *Arrest Warrant* case specifically excluded cases of persons who no longer held office.[137] Thus, while the *Habré* case undoubtedly constitutes practice, it should not be accorded too much weight as a subsidiary means of determining the rules of law since it is based on a misunderstanding of the primary judgment of the International Court of Justice on which it is based.[138]

130. Even discounting the incorrect reliance in the *Habré* case, the description above suggests that the balance of authorities support, for criminal proceedings, the non-application of immunity *ratione materiae*. There is, however, the problem of the logic of the *Jurisdictional Immunities of State* case. That logic would seem to apply to immunity in the context of both civil and criminal matters. In other words, there is

[133] United Kingdom, *Re Mofaz*, Judgement of 12 February 2004, and *Re Bo Xilai*, Judgment of 8 November 2005, Bow Street Magistrates Court.

[134] Senegal, *Hissène Habré Request*, Judgment of 25 November 2005, Court of Appeal of Dakar.

[135] Ibid., para. 6.

[136] Ibid., para. 5 ("Considérant que Hissène Habre doit alors bénéficier de cette immunité de juridiction qui, loin d'être une cause d'exonération de responsabilités pénales, revêt simplement un caractère procédural au sens de l'arrêt Yero Abdoulaye Ndombasi du 14/02/2002 rendu par la Cour Internationale de Justice dans le litige opposant le Royaume de Belgique à la République démocratique de Congo" ["Considering that Hissène Habré must then benefit from this immunity from jurisdiction, which was not an impunity for criminal responsibility, but merely a procedural characteristic within the meaning of the Yero Abdoulaye Ndombasi judgment of 14 February 2002 delivered by the International Court of Justice in the dispute between the Kingdom of Belgium and the Democratic Republic of Congo"]).

[137] See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment* (footnote 303 above), para. 61 ("Thirdly, after a person ceases to hold [the relevant office], he or she will no longer enjoy all of the immunities accorded by international law").

[138] See draft conclusions on identification of customary international law, Report of the Commission on the work of its sixty-eighth session (A/71/10), para. (3) of the commentary to conclusion 13 ("The value of such decisions varies greatly … depending both on the quality of the reasoning of each decision … and on the reception of the decision by States and by other courts").

no *a priori* reason why the rule enunciated in *Jurisdictional Immunities of the State* would apply to civil but not criminal matters. Two brief points can be made in response. First, the distinction between *jure gestionis* and *jure imperii* applies to civil matters but apparently not criminal matters. Thus, there are certainly differences between the two types of processes in relation to immunities. Second, and more importantly, as agreed at the commencement of the consideration of the topic, what should guide the Commission should be State practice and not theoretical considerations. It is particularly important to observe, in this regard, that some cases upholding immunity in civil matters have noted that different rules may apply to criminal matters.[339] To the extent that State practice, in the form of national court cases, supports the distinction, the Commission should follow that practice.

131. The view that, with respect to criminal proceedings, immunity *ratione materiae* does not apply in respect of acts whose prohibition constitutes a *jus cogens* norm is now reflected in the article 7 of the draft articles on immunity of State officials from foreign criminal jurisdiction.[340] This provides further support for including in the draft conclusions a provision on immunity.

132. The above discussion may be summarized as follows:

(a) States have a duty to exercise jurisdiction over offences prohibited by peremptory norms of international law (*jus cogens*) where the offences are committed by the nationals of that State or on the territory under its jurisdiction;

(b) the provision in (a) does not preclude the establishment of jurisdiction on any other ground as permitted under its national law, in accordance with international law;

(c) the fact that an act in violation of an offence prohibited by a peremptory norm of general international law (*jus cogens*) was committed by a person holding an official position shall not constitute a ground excluding criminal responsibility;

(d) immunity *ratione materiae* does not apply to any offence prohibited by a peremptory norm of general international law (*jus cogens*).

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[339] See, for example, *Al-Adsani v. the United Kingdom* (footnote 303 above), para. 61. See also *Yousuf v. Samantar* (footnote 316 above), p. 291 ("A number of decisions from foreign national courts have reflected a willingness to deny official-act immunity in the criminal context for alleged *jus cogens* violations," while noting that "the *jus cogens* exception appears to be less settled in the civil context"). For a criticism of this position, see Orakhelashvili, "Audience and authority" (footnote 69 above), p. 139.

[340] Draft article 7, as provisionally adopted in 2017, reads:

Crimes under international law in respect of which immunity *ratione materiae* shall not apply

1. Immunity ratione materiae from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:

(a) crime of genocide;

(b) crimes against humanity;

(c) war crimes;

(d) crime of apartheid;

(e) torture;

(f) enforced disappearance.

2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.

3. Effects of peremptory norms of general international law (*jus cogens*) on the jurisdiction of international courts and tribunals

133. The principle in the *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* case that the rule on immunities, as a procedural rule, does not conflict with substantive rules concerning *jus cogens* crimes has also been applied to the relationship between *jus cogens* and the jurisdiction of international courts and tribunals.[141] As described above, in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, the Democratic Republic of the Congo had sought to found jurisdiction of the International Court of Justice on the basis that the alleged breach at issue constituted a peremptory norm of international law, i.e. that the Court had jurisdiction even though Rwanda had not, as required under the Statute of the International Court of Justice, consented to the jurisdiction of the Court. In particular, the Democratic Republic of the Congo had argued that article 66 of the 1969 Vienna Convention "establishe[d] the jurisdiction of the Court to settle disputes arising from the violation of peremptory norms".[142] Furthermore, the Democratic Republic of the Congo had argued that the reservation of Rwanda excluding the compromisory clause under the Convention on the Prevention and Punishment of the Crime of Genocide — which would have given the Court jurisdiction — was invalid since "it seeks to 'prevent ... the Court from fulfilling its noble mission of safeguarding peremptory norms'".[143] The Court rejected this argument noting that "the fact that a dispute relates to compliance with [a *jus cogens* norm] ... cannot of itself provide a basis for the jurisdiction of the Court" since, "[u]nder the Court's Statute that jurisdiction is always based on the consent of the parties."[144] This principle was reiterated by the Court in *Application of the Convention on the Prevention and Punishment of Genocide (Croatia v. Serbia)*.[145]

134. Whatever criticisms may be levelled against the procedural versus substantive dichotomy in the *Jurisdictional Immunities of the State* case,[146] the distinction between procedural and substantive norms seems hard to criticize in the context of jurisdiction. It would be going too far to suggest that any invocation of a *jus cogens* would grant the International Court of Justice jurisdiction in a dispute. Such an assertion would literally make meaningless the requirement for consent to jurisdiction. Without entering into the debate concerning the correctness or not of the distinction between substance and procedure in the context of immunities, it seems reasonable to conclude that there is a closer relationship between the procedural rules of immunities and the substantive rules underlying *jus cogens* norms than there is between the procedural rule requiring consent to jurisdiction and the substantive norm underlying *jus cogens* norms.

135. The principle that allegations of violations of *jus cogens* do not, without consent to jurisdiction, bestow jurisdiction on an international tribunal must be read with article 66 of the 1969 Vienna Convention. Thus, in cases where the Convention

[141] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment (note 303 above), para. 95.

[142] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (footnote 124 above), para. 15.

[143] Ibid., para. 56.

[144] Ibid., para. 66.

[145] *Application of the Convention on the Prevention and Punishment of Genocide (Croatia v. Serbia), Judgment* (note 262 above), para. 88.

[146] See, example of criticism levelled against *Jurisdictional Immunities* case, Orakhelashvili, "Audience and authority" (footnote 69 above), p. 138; *Military Prosecutor v. Al'ers and Others*, Judgment of the Italian Court of Cassation of 9 August 2012, para. 5.

applies, i.e. where both parties to a dispute are party to the Convention, an allegation that a treaty violates a norm of *jus cogens* could form the basis for the jurisdiction of the Court. However, in accordance with article 66, this applies only to the question of invalidation of treaties and not to general issues pertaining to *jus cogens*. Thus the provision only applies if the validity of a treaty is at issue.

136. The above brief discussion may be summarized as follows: subject to the application of article 66 of the 1969 Vienna Convention, the fact that a dispute involves a peremptory norm of general international law (*jus cogens*) is not sufficient to establish the jurisdiction of the Court without the necessary consent to jurisdiction in accordance with international law.

4. Effects of peremptory norms of general international law (*jus cogens*) on other sources of international law

137. While the effects of *jus cogens* on the validity of treaties is well established due in large part to article 53 of the 1969 Vienna Convention, the effects of *jus cogens* on the validity of other sources is less established. The present section of the report will consider the effects of *jus cogens* on other main sources, namely customary international law, unilateral acts and resolutions of the Security Council under Chapter VII of the Charter of the United Nations.

(a) Customary international law

138. Paragraph 2 of draft conclusion 5 proposed in the Special Rapporteur's second report stated that "[c]ustomary international law is the most common basis for the formation of *jus cogens* norms of international law".[147] Based on this relationship between customary international law and *jus cogens*, Kawasaki has suggested that a conflict between *jus cogens* and customary international law is not possible.[148] First, he suggests that as a "factual process of accumulation of State practice accompanied by the collective consciousness of obligation", customary international law is not a "legal act" creating a "right, obligation or some other legal situation" and thereby capable of being invalid.[149] Second, he suggests that, because of that process, a customary international law rule conflicting with a norm of *jus cogens* cannot occur because it would be precluded by the existence of the *jus cogens* norm.[150]

139. With respect to the first objection of Kawasaki, it has to be noted that the factual process described leads to a rule and that rule, whatever its origins, is capable of conflicting with a norm of *jus cogens*. Indeed, even the treaty process involves a factual process — negotiation — followed by acts of consent that create rights and obligations. As to the second objection, it bears mentioning that under the 1969 Vienna Convention, a treaty that conflicts with a pre-existing *jus cogens* norm is also void *ab initio* — in other words, it does not come into existence. The reason the treaty provision does not come into existence is because it conflicts with a pre-existing norm of *jus cogens*. By the same token, a widespread practice, even if States believe that practice to be law,

[147] The Drafting Committee provisionally adopted this provision in 2017, substantially unchanged. See statement of the Chairperson of the Drafting Committee on peremptory norms of general international law (*jus cogens*), 26 July 2017, annex, draft conclusion 5, para. 2 ("Customary international law is the most common basis for peremptory norms of general international law (*jus cogens*)").

[148] Kawasaki, "A brief note on the legal effects of *jus cogens* in international law" (see footnote 75 above), p. 31.

[149] Ibid.

[150] Ibid.

would not create a rule of customary international law because such a rule would be void *ab initio* for being in conflict with a hierarchically superior norm of *jus cogens*. It might be argued that it is highly unlikely that States would accept any such practice as law. But even here the analogy with treaty law is relevant because, as the practice has shown, it is highly unlikely that States would conclude treaties that are in conflict with *jus cogens*. This reality, however, does not negate the necessity of providing for a rule of nullity of customary international law due to conflict with a norm of *jus cogens* in the event, even if unlikely, that such a conflict might emerge. At any rate, particular customary international law (regional or local customary international law) may also emerge, which may conflict with *jus cogens*. Any conclusion that a customary international law rule that is inconsistent with *jus cogens* is invalid would also apply to invalidate particular customary international law.[351]

140. The report will now turn to the consideration of the effects of *jus cogens* on customary international law in practice. The notion that customary international law rules that conflict with norms of *jus cogens* are invalid flows from the hierarchical superiority and is reflected in the practice of States. In *Committee of United States Citizens Living in Nicaragua v. Reagan*, the United States Court of Appeals for the District of Columbia observed that *jus cogens* norms "enjoy the highest status in international law and *prevail over both customary international law* and treaties".[352] In the United Kingdom, the Queen's Bench Division of the England and Wales High Court of Justice in R (*Mohamedi v. Secretary of State for Foreign and Commonwealth Affairs*, also referred to the hierarchical superiority of *jus cogens* norms and, consequently, "that derogation by States through treaties or rules of customary law not possessing the same status [was] not permitted".[353] The Argentine Supreme Court has similarly stated that crimes against humanity had the "character of *jus cogens*, meaning that [the prohibition is] above both treaty law, but above all other sources of international law".[354] In the *Kenya Section of the International Commission of Jurists v. Attorney-General*, the Kenyan High Court stated that *jus cogens* norms "rendered void any other pre-emptory rules which come into conflict with them".[355] This sense that norms of *jus cogens* take precedence over other customary international law has also been affirmed in the jurisprudence of regional courts. In *Al-Adsani*, for example, the European Court of Human Rights determined that *jus cogens* norms are those norms that enjoy "a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules".[356] Judges Rozakis and Caflisch, joined by Judges

[351] Klemlem, "*Jus cogens* as the 'highest law'? Peremptory norms and legal hierarchies" (see footnote 64 above), p. 187 ("It is a relatively straightforward case to perceive a structural hierarchy between *jus cogens* and regional or local customary rules").

[352] United States, 859 F.2d 929 (DC Cir. 1988), p. 940 (emphasis added). See also *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992) at 715. See also *Sabbith v. Al Saleh*, 605 F. Supp. 2d 122 (D.D.C. 2009), p. 129.

[353] United Kingdom, *R (Mohamedi v. Secretary of State for Foreign and Commonwealth Affairs* [2009] 1 WLR 2579, p. 142 (ii).

[354] Argentina, *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad*, case No. 17.768, judgment of 14 June 2005, Supreme Court of Argentina (original: "el caracter de *ius cogens* de modo que se encuentra no solo por encima de los tratados sino incluso por sobre todas las fuentes del derecho").

[355] Kenya, *Kenya Section of the International Commission of Jurists v. Attorney-General and others*, Judgment of the High Court, p. 14.

[356] *Al-Adsani v. United Kingdom* (see footnote 303 above), para. 30, citing *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, 10 December 1998, *Judicial Reports 1998*, vol. 1, para. 153.

Wildhaber, Costa, Cabral Barreto and Vajic, were even clearer in their joint dissenting opinion, making the following observations:

> By accepting that the rule on prohibition of torture is a rule of *jus cogens*, the majority recognise that it is hierarchically higher than any other rule of international law … For the basic characteristic of a *jus cogens* rule is that … it overrides any other rule which does not have the same status. In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails.[357]

141. Whatever the doctrinal debate about whether it is possible for a rule of customary international law to be in conflict with a norm of *jus cogens*, what is clear is that, on the basis of practice, were such a conflict to arise, the *jus cogens* norm would prevail and the conflicting customary international law would be invalid. This applies both to cases of a pre-existing norm of *jus cogens* and one that arises subsequent to the emergence of the rule of customary international law. In accordance with article 53 of the 1969 Vienna Convention, the only exception to this principle is where the customary international law in question is itself a norm of *jus cogens* capable of modifying the pre-existing *jus cogens* norm.

142. A related question concerns whether the persistent objector doctrine applies to *jus cogens* norms. The Commission has already determined that, where a State has persistently objected to a rule of customary international law, that "rule is not opposable to the State concerned".[358] The Commission, however, was mindful that the inclusion of this provision was to be "without prejudice to any issues of *jus cogens*".[359] As a doctrinal matter, an issue that has been raised is whether it is even possible for a norm of *jus cogens* to emerge if there is a persistent objector.[360] In the view of the Special Rapporteur, persistent objection to the formation of a rule of customary international law cannot prevent the emergence of a *jus cogens* norm. Once the rule of customary international law has been formed, the question that has to be addressed is whether "the international community as a whole" — as described in the second report of the Special Rapporteur and defined in draft conclusion 7[361] — accepts and recognizes the non-derogability of the norm in question. Needless to say, if there are a sufficient number of objectors, then the *jus cogens* norm does not arise, not because of the persistent objector rule but because there would not be a large enough majority of States to qualify as "recognition of the international community of States as a whole". The key question, thus, is, in the event that the test of acceptance and recognition of the non-derogability of the norm in question is shown, whether the persistent objector State(s) will be bound by the *jus cogens* norm in question.

143. As described in the first and second reports of the Special Rapporteur, and reflected in the draft conclusions provisionally adopted by the Drafting Committee in 2017, *jus cogens* norms are universally applicable.[362] While it may be argued that norms of *jus cogens* are non-opposable against a "persistent objector", this would go against the very notion of the universal applicability of *jus cogens*. In this regard, the Swiss Federal Court in the *Vadaï* case stated that the norms of *jus cogens* "were

[357] *Al-Adsani v United Kingdom* (see footnote 303 above), joint dissenting opinion of Judges Rozakis and Caflisch (joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic), para. 1.

[358] See draft conclusions on the identification of customary international law, conclusion 15.

[359] Ibid., para. (10) of commentary to conclusion 15.

[360] See, e.g., Mik, "*Jus cogens* in contemporary international law" (footnote 179 above), p. 50.

[361] Statement of the Chairperson of the Drafting Committee on peremptory norms of general international law (*jus cogens*), 26 July 2017, annex, draft conclusion 7.

[362] A/CN.4/693, paras. 67–68, and A/CN.4/706, paras. 28–30.

binding on all subjects of international law".[963] Furthermore, in *Belhas v. Moshe Ya'Alon*, the United States Court of Appeals for the District of Columbia described *jus cogens* norms as "norms so universally accepted that *all States* are deemed to be bound by them under international law".[964] The Inter-American Court of Human Rights has similarly concluded that norms of *jus cogens* "bind all States".[965]

144. For the persistent objector doctrine to even be a possibility in the face of the acceptance, as a point of departure, of the universal application of *jus cogens*, would require clear and unequivocal practice carving out such an exception. This is because, by definition, the persistent objector rule, applied to norms of *jus cogens*, would imply the permissibility of derogation. Yet, the character and status of *jus cogens* norms are defined by their non-derogability. The Special Rapporteur has not, in the preparation of the present report, been able to find a single example of practice supporting the notion that the persistent objector doctrine applies to *jus cogens* norms as an exception to the rule of universal application of *jus cogens* norms. On the contrary, there is practice indicating the opposite. In Michael Domingues, in particular, the Inter-American Commission on Human Rights determined that *jus cogens* norms "bind the international community as a whole, irrespective of protest, recognition or acquiescence".[966] This was an important declaration because it was made in response to a clear invocation of the persistent objector doctrine.

145. The discussion above may be summarized as follows:

(a) a customary international law rule does not emerge if it conflicts with a peremptory norm of general international law (*jus cogens*);

(b) a customary international law rule not of *jus cogens* character ceases to exist if a new conflicting peremptory norm of general international law (*jus cogens*) arises;

(c) since peremptory norms of general international law (*jus cogens*) bind all subjects of international law, the persistent objector doctrine does not apply.

(b) Unilateral acts

146. The Commission has already recognized that international law, as it currently stands, recognizes that States can assume obligations through unilateral acts.[967] Unilateral acts that may, under appropriate circumstances, give rise to legal

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[963] Switzerland, *Nada (Youssef) v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, Administrative Appeal, Judgment of 14 November 2007, Federal Supreme Court, Case No 1A 45/2007, ILDC 461 (CH 2007), para. 7 (emphasis added).

[964] United States, *Belhas v. Moshe Ya'Alon*, 515 F.3d 1279 (DC Cir. 2008), at 1291–1292 (emphasis added).

[965] *Advisory Opinion OC-18/03 of 17 September 2003 on the juridical condition and rights of undocumented migrants, requested by the United Mexican States*, Series A, No. 18, paras. 4–5. See also written statement of 19 June 1995 by the Government of Mexico on the request for an advisory opinion submitted to the International Court of Justice by the General Assembly at its forty-ninth session (resolution 49/75K), para. 7 ("The norms … are of a legally binding nature for all the States (*jus cogens*)"). See also Iran (Islamic Republic of) (A/C.6/68/SR.26), para. 4 ("the 'persistent objector' had no place in the formation of *jus cogens*").

[966] *Michael Domingues v. United States*, Case 12.285, report No. 62/02, Inter-American Commission on Human Rights, Decision of 22 October 2000, para. 49.

[967] Guiding principles applicable to unilateral declarations of States capable of creating legal obligations, Report of the Commission on the work of its fifty-eighth session, *Yearbook … 2006*, vol. II (Part Two). See also Mik, "*Jus cogens* in contemporary international law" (footnote 179 above), p. 44.

obligations include declarations and other conduct.[168] It would make little sense if States were precluded from assuming obligations in conflict with *jus cogens* through treaties, but permitted to assume those same obligations through unilateral acts.

147. The Commission has recognized that a unilateral act that is in conflict with a peremptory norm of general international law is void.[169] In the commentary to guiding principle 8 of the guiding principles applicable to unilateral declarations of States capable of creating legal obligations, the Commission stated that the rule that a unilateral act in conflict with a peremptory norm of international law is invalid "derives from the analogous rule contained in article 53 of the 1969 Vienna Convention".[170] This rule is a recognition of the fact that *jus cogens* prohibits any derogation. A unilateral act purporting to create rights and/or obligations inconsistent with *jus cogens* amounts to a derogation and is thus not permitted. The judgment of the International Court of Justice in *Democratic Republic of the Congo v. Rwanda* has been interpreted as acknowledging the possibility of the invalidity of a reservation, itself a unilateral act, on account of conflict with a *jus cogens* norm.[171]

148. The Commission has also acknowledged non-derogation in respect of unilateral acts in its work on reservation to treaties.[172] It will, in this connection, be recalled that reservations to treaties, though falling outside the scope of the guiding principles applicable to unilateral declarations of States capable of creating legal obligations, are themselves unilateral acts. In its work on reservations to treaties, the Commission stated that it was "certainly true" that "the rule prohibiting derogation from a rule of *jus cogens* applies not only to treaty relations, but also to all legal acts, including unilateral acts".[173] The present report concluded above, consistent with the Commission's work on reservations, that reservations to a treaty are not necessarily invalid but that such a reservation "does not affect the binding nature of that norm, which shall continue to apply".[174] This is because a reservation serves as a reservation to a treaty rule and not a peremptory norm of *general international law*. It is for this reason that, although it may be valid for the purposes of the treaty, it does not affect the peremptory norms of general international law (*jus cogens*).

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[168] For a full description of types of unilateral acts, see Costelloe, *Legal Consequences of Peremptory Norms in International Law* (see footnote 60 above), pp. 152 et seq. It is not necessary, for the purposes of the present report, to distinguish different types of unilateral acts.

[169] Guiding principles applicable to unilateral declarations of States capable of creating legal obligations, guiding principle 8.

[170] Ibid., commentary to guiding principle 8.

[171] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (note 124 above), para. 69 ("In so far as the [Democratic Republic of the Congo] contended further that Rwanda's reservation is in conflict with a peremptory norm of general international law, it suffices for the Court to note that no such norm presently exists requiring a State to consent to the jurisdiction of the Court in order to settle a dispute relating to the Genocide Convention"). See guiding principles applicable to unilateral declarations of States capable of creating legal obligations, commentary to guiding principle 8 ("the Court did not exclude the possibility that a unilateral declaration by Rwanda could be invalid in the event that it was in conflict with a norm *of jus cogens*, which proved, however, not to be the case"). See also Knuchel, "*Jus cogens*: identification and enforcement of peremptory norms" (note 64 above), p. 160 ("This point ... has been indirectly recognized by the [International Court of Justice]. In *Armed Activities*, the Court did not exclude that a reservation by Rwanda could be invalid in the event that it was in conflict with *jus cogens*, but found that this proved not be the case").

[172] Guide to Practice on Reservations to Treaties, para. (18) of commentary to guideline 3.1.5.3.

[173] Ibid.

[174] See para. 76 above.

149. To the extent that a unilateral act is intended or purports to create rights and/or obligations, those rights and obligations must be consistent with peremptory norms of general international law. Accordingly, a unilateral act that is in conflict with a peremptory norm of general international law (*jus cogens*) is invalid.

(c) Resolutions of international organizations, including those of the Security Council

150. As a rule, resolutions of international organizations are not binding under international law. Thus, under normal circumstances, a resolution of an international organization does not create rights and obligations and can, therefore, not derogate from *jus dispositivum* rules of international law, let alone *jus cogens* norms. Security Council resolutions, however, may contain rules that are binding on Member States of the United Nations.[375] As a legal act, it would be expected that the rule of non-derogation from peremptory norms would be equally applicable to Security Council resolutions.[376] Yet, what makes binding determinations in Security Council resolutions different from other legal acts is that they, like *jus cogens* norms, have the unique characteristic of being hierarchically superior to other rules. Under Article 103 of the Charter of the United Nations, "obligations under the ... Charter" prevail over "obligations under any other international agreement". It is important to emphasize that Article 103 of the Charter, unlike article 53 of the 1969 Vienna Convention, does not provide for the invalidity of the "other international agreements", it merely provides a rule of priority.[377]

151. As with treaties, the possibility of the Security Council adopting a resolution which, on the face of it, is in conflict with a peremptory norm of international law, is highly unlikely. It is, nonetheless, not impossible, and to the extent that there is any practice indicating how such a conflict is to be resolved, it is necessary to provide some conclusions.

152. The weight of the literature supports the idea that resolutions of the Security Council that are in conflict with a norm of *jus cogens* are invalid.[378] Indeed, it is generally agreed that Security Council resolutions are subject to *jus cogens* and the Principles and Purposes of the Charter, some of which may constitute *jus cogens*.[379] Costelloe has expressed doubt as to the correctness of the notion that a Security

[375] Charter of the United Nations, Art. 25 ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter").

[376] See, e.g., Guide to Practice on Reservations, para. (18) of commentary to guideline 3.1.5.3 ("[it] is certainly true" that "the rule prohibiting derogation from a rule of *jus cogens* applies not only to treaty relations, but also to all legal acts, including unilateral acts").

[377] See, for discussion, João Ernesto Christofolo, *Solving Antinomies between Peremptory Norms in Public International Law* (Geneva, Schulthess, 2016), pp. 98–100.

[378] See, in general, Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford and Portland, Oregon, Hart, 2004), and Anne Peters, "The Security Council: Functions and Powers — Article 25", in *The Charter of the United Nations: A Commentary (volume I)*, 3rd ed. Bruno Simma and others, eds. (Oxford, Oxford University Press, 2012). See also Kleimlein, "*Jus cogens* as the 'highest law'? Peremptory norms and legal hierarchies" (footnote 64 above), p. 186 ("It seems to be generally accepted that binding legal acts of international organisations like resolutions of the Security Council of the United Nations ... are also void if they are in conflict with *jus cogens*").

[379] Dire Tladi and Gillian Taylor, "On the Al Qaida/Taliban sanctions regime: due process and sunsetting", *Chinese Journal of International Law*, vol. 10 (2011), pp. 771–789; Kleimlein, "*Jus cogens* as the 'highest law'? Peremptory norms and legal hierarchies" (see footnote 64 above), p. 186. See also Hennie Strydom, "Counter-terrorism sanctions and human rights", in *The Pursuit of a Brave New World in International Law*, Maluwa, du Plessis and Tladi (footnote 302 above).

Council resolution is invalid if it conflicts with *jus cogens*.[180] He suggests, *inter alia*, that there is no practice to support this notion.[181]

153. States have, on several occasions, expressed the view that Security Council resolutions must comply with norms of *jus cogens*. Switzerland, for example, during a Security Council meeting on terrorism, noted that "some courts have also expressed their willingness to ensure that Security Council decisions comply with" *jus cogens* norms and that *jus cogens* norms were norms "from which neither the Member States nor the United Nations may derogate".[182] In a similar vein, Qatar has noted that while, by virtue of Article 103 of the Charter, obligations flowing from Security Council resolutions supersede other obligations, this did not apply to *jus cogens* norms.[183] Finland observed that there was a "widely held view that the powers of the Security Council, albeit exceptionally wide, were limited by the peremptory norms of international law".[184] More directly, the Islamic Republic of Iran observed that "the Security Council was subject to and obliged to comply with … peremptory norms of international law (*jus cogens*)".[185] Only the United States had expressed *some* doubt about the primacy of *jus cogens* norms over Security Council resolutions:

> It was important that the Commission should not adopt any rule that could be interpreted as limiting the primacy of Charter obligations or the authority of the Security Council. In view of the uncertainty regarding what fell under the categories of *jus cogens*, obligations *erga omnes* and Article 103 of the Charter of the United Nations, general pronouncements about the relationship among those categories should be avoided.[186]

154. That the powers of the Security Council are limited by and subject to *jus cogens* norms has also been recognized in a number of judicial decisions. Most famously, the International Criminal Tribunal for the Former Yugoslavia, itself established by a Security Council resolution, has observed that the powers of the Security Council are "subject to respect for peremptory norms of international law (*jus cogens*)".[187] The British House of Lords has also determined that Security Council resolutions prevailed over other international obligations, including those in the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), "save where an obligation is *jus cogens*".[188] The Court of First Instance of the European Court of Justice has also stated that *jus cogens* norms were

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[180] Costelloe, Legal Consequences of Peremptory Norms in International Law (see footnote 60 above), pp. 128–136.

[181] Ibid., p. 133.

[182] Switzerland, 5446th meeting, 30 May 2006 (see S/PV.5446). See also Argentina, and Nigeria, 5474th meeting, 22 June 2006 (see S/PV.5474), and Qatar, 5679th meeting, 22 May 2007 (S/PV.5679).

[183] Qatar, 5779th meeting, 14 November 2007 (S/PV.5779).

[184] Finland, speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), during the sixty session of General Assembly, agenda item 80.

[185] Iran (Islamic Republic of), sixty-sixth session of the General Assembly, agenda item 82.

[186] United States (A/C.6/60/SR.20), para. 36.

[187] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment, Appeals Chamber, the International Tribunal for the Former Yugoslavia, 15 July 1999, *Judicial Reports 1999*, para. 296.

[188] United Kingdom, *R v. Secretary of State for Defence (On the Application of Al-Jedda)*, Judgment of 12 December 2007, House of Lords [2008] All ER 28 (Lord Bingham). See also United Kingdom, R and Justice (*On the Application of Al-Jedda*), Judgment of 29 March 2006, Appeal Court, para. 71 ("If the Security Council, acting under Chapter VII, considers that the exigencies posed by a threat to peace must override … the requirements of a human rights convention (seemingly other than *ius cogens*, from which no derogation is possible), the UN Charter has given it the power to do so").

a "body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible".[489] The Court continued that "there exists one limit to the principle that resolutions of the Security Council have binding effect: namely that they must observe the fundamental peremptory provisions of *jus cogens*". In the view of the Court, if the resolution of the Security Council contains obligations that are in conflict with a norm of *jus cogens*, "they would bind neither the Member States of the United Nations, nor, in consequence, the Community".[490] The Swiss Federal Supreme Court was more explicit in this respect:

> Grenze der Anwendungspflicht für Resolutionen des Sicherheitsrats stellt jedoch das *ius cogens* als zwingendes, für alle Völkerrechtssubjekte verbindliches Recht dar. Zu prüfen ist deshalb, ob die Sanktionsbeschlüsse des Sicherheitsrats *ius cogens* verletzen, wie der Beschwerdeführer geltend macht.[491]

155. While some might suggest that the practice described above is not extensive, two points have to recalled. First, given the rarity of situations in which Security Council resolutions are alleged to be contrary to norms of *jus cogens*, it is unsurprising that the practice would not be as extensive as it might otherwise be. Second, other than the United States' position described above — which itself is not firm — there is virtually no evidence supporting the opposite conclusion. States that hold a different view have had ample opportunity to express their differing views in response to the statements by other States and the reports of the Commission on fragmentation. The conclusions of the work of the Study Group on fragmentation determined that the Security Council action should be in accordance with norms of *jus cogens*.[492]

156. There is perhaps no better explanation for the notion that Security Council resolutions may not derogate from *jus cogens* norms than the famous separate opinion of Judge Lauterpacht in *Application of the Convention on the Prevention and*

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[489] *Yassin Abdullah Kadi v. Council of the Europe and Commission of the European Communities*, Case T-315/01, Judgment of 21 September 2005, Court of First Instance of the European Communities, para. 226.

[490] Ibid., para. 230. Although *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P, Judgment of 3 September 2008, Grand Chamber, European Court of Justice, set aside the judgment of the Court of First Instance, in doing so, it did not conclude that Security Council resolutions were not subject to *jus cogens*. The Grand Chamber rather determined that its mandate was the review of the Community act and not to the acts of other organizations (paras. 286–289).

[491] Switzerland, *Nada (Youssef) v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, Administrative Appeal Judgment of 14 November 2007, Federal Supreme Court, para. 7 ("Yet *jus cogens*, the peremptory law binding on all subjects of international law, marks the limit of the obligation to apply Resolutions of the Security Council. For this reason, it must be determined whether, as the petitioner asserts, the Resolutions of the Security Council containing the sanction violate *jus cogens*.") (translation courtesy of *Oxford Reports on International Law in Domestic Courts*). See also *A v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, Administrative First Instance Judgment, Federal Supreme Court, First Public Law Division, para. 7.

[492] Para. (40) of the conclusions of the work of the Study Group on fragmentation of international law: difficulties arising from the diversification and expansion of international law, in *Yearbook ... 2006*, vol. II (Part Two), para. 251. See also "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr.1 and Add.1) (see footnote 142 above), para. 360.

Punishment of the Crime of Genocide."[351] Judge Lauterpacht noted that priority accorded to the Security Council by virtue of Article 103 of the Charter "cannot — as a matter of simple hierarchy of norms — extend to a conflict between a Security Council resolution and *jus cogens*".[352] Judge Lauterpacht's opinion is particularly powerful because of the logical necessity advanced for the principle: "Indeed, one only has to state the opposite proposition thus — that a Security Council resolution may even require participation in genocide — for its unacceptability to be apparent".[353]

157. The above indicates that even Security Council resolutions are subject to the non-derogability rule of norms of *jus cogens*. Yet, as with treaty law, given the important functions of Security Council resolutions, it would be expected that, if at all possible, the consequences of invalidity be avoided through the rules of interpretation.[354] Indeed, though Security Council resolutions are not treaties, it has been suggested that the Vienna rules of interpretation may be applied to the interpretation of Security Council resolutions.[355] The Special Tribunal for Lebanon determined that the Vienna rules of interpretation are applicable to its Statute "whether the Statute is" seen as a treaty or a resolution of the Security Council since those rules of interpretation must "be held to be applicable to any internationally binding instrument, whatever its normative source".[356] Since the rules of interpretation, as suggested above, require an interpretation consistent with general international law, including *jus cogens*, Security Council should, to the extent possible, be interpreted in a manner consistent with *jus cogens*.

158. The view that Security Council resolutions should, as far as possible, be interpreted in a manner that makes them consistent with *jus cogens* norms has also been expressed by States. In its application in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Bosnia and Herzegovina argued that "all ... Security Council resolutions must be construed in a manner

[351] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 325, separate opinion of Judge Lauterpacht, at p. 407.

[352] Ibid., para. 100.

[353] Ibid.

[354] Costelloe, Legal Consequences of Peremptory Norms in International Law (see footnote 60 above), p. 151.

[355] Dire Tladi, "Interpretation of protection of civilians mandates in the United Nations Security Council resolutions", in *By All Means Necessary: Protecting Civilians and Preventing Mass Atrocities in Africa*, Dan Kuwali and Frans Viljoen, eds. (Pretoria, Pretoria University Law Press, 2017), p. 75. See also oral arguments of South Africa before the International Criminal Court on 7 April 2017 (ICC-02/05-01/09-T-2-ENG ET WT 07-04-2017 1-92 SZ PT), p. 26. See also *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, Seabed Disputes Chamber, International Tribunal for the Law of the Sea, p. 10, at p. 29, para. 60. See also, although in more cautionary terms, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at p. 442, para. 94, stating that, while the Vienna rules may provide guidance, interpretation of Security Council resolutions may require other considerations to be taken into account.

[356] *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Case No. STL-11-01/I, Judgment, 16 February 2011, Appeals Chamber, Special Tribunal for Lebanon, para. 26.

consistent" with the prohibition on the use of force, a norm of *jus cogens*."[399] Similarly, the Islamic Republic of Iran has stated that Security Council resolution 713 (1991) — incidentally the same resolution to which Bosnia and Herzegovina was referring — "cannot be interpreted now in a manner that would run counter to the Charter of the United Nations or to the principles of *jus cogens*".[400] The idea that Security Council resolutions must be interpreted, where possible, in a manner that is consistent with international law has, in fact, been applied to other rules of international law. In *Al-Dulimi*, for example, the Grand Chamber of the European Court of Justice held an interpretation "which is most in harmony with the [European Convention on Human Rights]" must be chosen and that this presumption can only be rebutted if a resolution contains clear and explicit language that it intends to States to adopt measures in conflict with their obligations.[401]

159. The above discussion may be summarized as follows:

(a) binding resolutions of international organizations, including those of the Security Council of the United Nations, do not establish binding obligations if they conflict with a peremptory norm of general international law (*jus cogens*);

(b) to the extent possible, resolutions of international organizations, including those of the Security Council of the United Nations, must be interpreted in a manner consistent with peremptory norms of general international law (*jus cogens*).

IV. Proposals for draft conclusions

160. On the basis of the present report, the following draft conclusions are proposed:

Draft conclusion 10
Invalidity of a treaty in conflict with a peremptory norm of general international law (*jus cogens*)

1. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (*jus cogens*). Such a treaty does not create any rights or obligations.

2. An existing treaty becomes void and terminates if it conflicts with a new peremptory norm of general international law (*jus cogens*) that emerges subsequent to the conclusion of the treaty. Parties to such a treaty are released from any further obligation to perform in terms of the treaty.

[399] *Application instituting proceedings submitted by the Republic of Bosnia and Herzegovina*, 20 March 1993, para. 122, in the case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures* (see footnote 393 above).

[400] Iran (Islamic Republic of), 3370th meeting of the Security Council, 27 April 1994 (see S/PV.3370).

[401] *Al-Dulimi and Montana Management Inc. v. Switzerland*, Grand Chamber, No. 5809/08, European Court of Human Rights, ECHR 2016, para. 140. See also *Nada v. Switzerland*, Grand Chamber, No. 10593/08, European Court of Human Rights, ECHR 2012, para. 172. See especially *Al-Jedda v. the United Kingdom*, Grand Chamber, No. 27021/08, ECHR 2011, para. 102 ("Against this background, the Court considers that, in interpreting [Security Council resolutions], there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights.").

3. To avoid conflict with a peremptory norm of general international law, a provision in a treaty should, as far as possible, be interpreted in a way that renders it consistent with a peremptory norm of general international law (*jus cogens*).

Draft conclusion 11
Severability of treaty provisions in conflict with peremptory norm of general international law (*jus cogens*)

1. A treaty which, at its conclusion, is in conflict with a peremptory norm of general international law (*jus cogens*) is invalid in whole, and no part of the treaty may be severed or separated.

2. A treaty which becomes become invalid due to the emergence of a new peremptory norm of general international law (*jus cogens*) terminates in whole, unless:

(a) the provisions that are in conflict with a peremptory norm of general international law (*jus cogens*) are separable from the remainder of the treaty with regards to their application;

(b) the provisions that are in conflict with a peremptory norm of general international law (*jus cogens*) do not constitute an essential basis of the consent to the treaty; and

(c) continued performance of the remainder of the treaty would not be unjust.

Draft conclusion 12
Elimination of consequences of acts performed in reliance of invalid treaty

1. Parties to a treaty which is invalid as a result of being in conflict with a peremptory norm of general international law (*jus cogens*) at the time of the treaty's conclusion have a legal obligation to eliminate the consequences of any act performed in reliance of the treaty.

2. The termination of a treaty on account of the emergence of a new peremptory norm of general international law (*jus cogens*) does not affect any right, obligation or legal situation created through the execution of the treaty prior to the termination of the treaty unless such a right, obligation or legal situation is itself in conflict with a peremptory norm of general international law (*jus cogens*).

Draft conclusion 13
Effects of peremptory norms of general international law (*jus cogens*) on reservations to treaties

1. A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply.

2. A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law (*jus cogens*).

Draft conclusion 14
Recommended procedure regarding settlement of disputes involving conflict between a treaty and a peremptory norm of general international law (*jus cogens*)

1. Subject to the jurisdictional rules of the International Court of Justice, any dispute concerning whether a treaty conflicts with a peremptory norm of general international law (*jus cogens*) should be submitted to the International Court of Justice for a decision, unless the parties to the dispute agree to submit the dispute to arbitration.

2. Notwithstanding paragraph 1, the fact that a dispute involves a peremptory norm of general international law (*jus cogens*) is not sufficient to establish the jurisdiction of the Court without the necessary consent to jurisdiction in accordance with international law.

Draft conclusion 15
Consequences of peremptory norms of general international law (*jus cogens*) for customary international law

1. A customary international law rule does not arise if it conflicts with a peremptory norm of general international law (*jus cogens*).

2. A customary international law rule not of *jus cogens* character ceases to exist if a new conflicting peremptory norm of general international law (*jus cogens*) arises.

3. Since peremptory norms of general international law (*jus cogens*) bind all subjects of international law, the persistent objector rule is not applicable.

Draft conclusion 16
Consequences of peremptory norms of general international law (*jus cogens*) on unilateral acts

A unilateral act that is in conflict with a peremptory norm of general international law (*jus cogens*) is invalid.

Draft conclusion 17
Consequences of peremptory norms of general international law (*jus cogens*) for binding resolutions of international organizations

1. Binding resolutions of international organizations, including those of the Security Council of the United Nations, do not establish binding obligations if they conflict with a peremptory norm of general international law (*jus cogens*).

2. To the extent possible, resolutions of international organizations, including those of the Security Council of the United Nations, must be interpreted in a manner consistent with peremptory norms of general international law (*jus cogens*).

Draft conclusion 18
The relationship between peremptory norms of general international law (*jus cogens*) and obligations *erga omnes*

Peremptory norms of general international law (*jus cogens*) establish obligations *erga omnes*, the breach of which concerns all States.

Draft conclusion 19
Effects of peremptory norms of general international law (*jus cogens*) on circumstances precluding wrongfulness

1. No circumstance may be advanced to preclude the wrongfulness of an act which is not in conformity with an obligation arising under a peremptory norm of general international law (*jus cogens*).

2. Paragraph 1 does not apply where a peremptory norm of general international law (*jus cogens*) emerges subsequent to the commission of an act.

Draft conclusion 20
Duty to cooperate

1. States shall cooperate to bring to an end through lawful means any serious breach of a peremptory norm of general international law (*jus cogens*).

2. A serious breach of a peremptory norm of general international law (*jus cogens*) refers to a breach that is either gross or systematic.

3. The cooperation envisioned in this draft conclusion can be carried out through institutionalized cooperation mechanisms or through ad hoc cooperative arrangements.

Draft conclusion 21
Duty not to recognize or render assistance

1. States have a duty not to recognize as lawful a situation created by a breach of a peremptory norm of general international law (*jus cogens*).

2. States shall not render aid or assistance in the maintenance of a situation created by a breach of a peremptory norm of general international law (*jus cogens*).

Draft conclusion 22
Duty to exercise domestic jurisdiction over crimes prohibited by peremptory norms of general international law

1. States have a duty to exercise jurisdiction over offences prohibited by peremptory norms of international law (*jus cogens*), where the offences are committed by the nationals of that State or on the territory under its jurisdiction.

2. Paragraph 1 does not preclude the establishment of jurisdiction on any other ground as permitted under its national law.

Draft conclusion 23
Irrelevance of official position and non-applicability of immunity *ratione materiae*

1. The fact that an offence prohibited by a peremptory norm of general international law (*jus cogens*) was committed by a person holding an official position shall not constitute a ground excluding criminal responsibility.

2. Immunity *ratione materiae* shall not apply to any offence prohibited by a peremptory norm of general international law (*jus cogens*).

161. During the deliberations in the Drafting Committee, some members suggested that it would be better to divide the draft conclusions into different parts. The Special Rapporteur is of the view that the draft conclusions have taken sufficient shape that

division into parts is warranted at this stage. Proposals in that regard will be made in the Drafting Committee.

V. Future work

162. In previous sessions of the Commission and the Sixth Committee, members of the Commission and States have presented their views on whether an illustrative list of norms of *jus cogens* ought to be provided. On the basis of those comments and observations, the next report will provide proposals on how to proceed with the question of an illustrative list of *jus cogens* norms. The next report will also address, again on the basis of views already expressed in the Commission and the Sixth Committee, the question of regional *jus cogens*. Finally, it will further consider any miscellaneous issues raised by the Commission and States. It may be possible, depending on future deliberations, to adopt the draft conclusions on first reading at the next session of the Commission.